

**CONSUMER PRODUCT SAFETY COMMISSION  
REAUTHORIZATION**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE FOR CONSUMERS  
OF THE  
COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION  
UNITED STATES SENATE  
NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

CONSUMER PRODUCT SAFETY COMMISSION REAUTHORIZATION

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## CONSUMER PRODUCT SAFETY COMMISSION REAUTHORIZATION

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FRIDAY, FEBRUARY 25, 1983

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
SUBCOMMITTEE FOR CONSUMERS,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Robert Jacobs and Marilyn Richmond, staff counsels; and Amy Bondurant and Loretta Dunn, minority staff counsels.

### OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Today the Consumer Subcommittee will review the activities of the Consumer Product Safety Commission in connection with the reauthorization of that agency.

Two years ago, our committee held hearings to reexamine the need for the Commission and to decide what amendments to the authorizing statute were necessary. At that time, we heard from a number of witnesses and discussed a number of issues. These issues included mandatory standards versus voluntary standards, the value of the Commission's jurisdiction over chronic hazards, and information disclosure, which we explored in detail.

As a result of these hearings, I sponsored legislation and we later enacted into law legislation which extended the programs of this important consumer protection agency for 2 years, while reforming the requirements for disclosing information, emphasizing the importance of seriously considering voluntary standards whenever possible, and instituting other necessary reforms.

Today it is my understanding that, unlike 2 years ago, there is only one issue of overall concern: The disclosure of product hazard information by the Consumer Product Safety Commission. The fact that few changes may be necessary this year demonstrates our success in addressing the problems which existed 2 years ago.

We are pleased to have with us today the Chairman of the Consumer Product Safety Commission, Nancy Steorts, and Commissioners Sloan, Zagoria, Statler, and others.

Following the Commission's testimony, we will be hearing from representatives from the business community, representatives from consumer groups, and representatives from the academic community. They will be addressing the disclosure of information issue as

well as the performance of the Commission since the committee's 1981 amendments, and also the future direction, the goals, and problems of the Consumer Product Safety Commission.

I also have an opening statement by Senator Hollings, and I would ask unanimous consent that the statement be made a part of the record at this point.

[The statement follows:]

**OPENING STATEMENT BY SENATOR HOLLINGS**

Today, we consider the 1983 authorization of the Consumer Product Safety Commission (CPSC).

Although the budget of this agency is modest, its responsibility is enormous for there are over 30 million product-related injuries a year. In the 1981 authorization hearings, we were discussing a 26-percent cut in the agency's budget as well as the Administration's plan to abolish the agency altogether. I am pleased to note that today, though the budget has been trimmed considerably, we are no longer facing a battle with the Administration over the agency's very existence or its independent status. If this issue should emerge again, I might add, I will be in the front lines fighting for a strong and viable independent agency.

I hope that this oversight hearing will prove that the agency has been using its limited resources wisely, for example, by working with industry to encourage effective voluntary standards. We must also discover, in the course of this hearing, whether the agency has carried out the mandate of the 1981 amendments.

I look forward to the testimony on these important issues.

Senator KASTEN. We are pleased to have all of you here with us today. I must say that over the last 2 years I have enjoyed working with you, and I look forward to continued success in the directions that you and all of us are going in.

Nancy, you may have an opening statement. I would like very much for you to summarize that statement if you could, and then we will proceed to questions.

**STATEMENTS OF HON. NANCY HARVEY STEORTS, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION, ACCOMPANIED BY MARTIN KATZ, GENERAL COUNSEL; EDITH BARSKDALE SLOAN; SAMUEL ZAGORIA; AND STUART M. STATLER, COMMISSIONERS**

Ms. STEORTS. Thank you very much, Mr. Chairman.

I would like to introduce my colleagues, Vice Chairman Edith Sloan, Commissioner Stuart Statler, and Commissioner Sam Zagoria, and to my left is our General Counsel, Martin Katz.

It is a pleasure for the Consumer Product Safety Commission to appear before you today to discuss our reauthorization and some of our achievements. We are here today as the nationally perceived No. 1 arm of Government in matters of protecting the consumer. This was the clear result of an independent Harris poll which industry commissioned and announced last week showing that CPSC received a favorable rating of almost two to one among Americans. We are gratified that our efforts in safety are meeting with success and that they are well received around the country.

Since the Consumer Product Safety Commission appeared before this subcommittee in 1981, much has been done by this agency toward the protection of the American consuming public while carrying out our congressional mandate.

Our primary function is the prevention of human suffering and deaths caused by unreasonable risk from consumer products. CPSC



actions since 1981 have prevented untold thousands of deaths and injuries.

We have been able to move forward in our mission of safety since we last appeared here. Although we have done so with a reduced budget and a diminished staff, it has sometimes been difficult in the face of limited resources.

Our policy and growing practice of achieving safety in consumer products, through voluntary means is working well. Such a policy is providing results in the products we buy, and furthermore, is increasing cooperative acceptance among industries. As a result, the working relationship among manufacturers, consumers, and the CPSC is at a high and effective level.

Some examples of cooperative efforts to develop voluntary standards with CPSC involvement are those which affect the safety of ladders, bathtubs and showers, playpens, infant strollers, hot water heaters, extension cords, electric blankets, and quartz heaters. Just since our reauthorization hearings 2 years ago, this agency has initiated 19 new voluntary standard development projects, and is now involved in 38 such projects for this fiscal year.

At this point, Mr. Chairman, I should point out that although the CPSC prefers and seeks cooperative solutions to product safety problems, it does not hesitate to put into place a mandatory standard when agreements are otherwise unreachable throughout a particular industry.

For example, the Commission has recently voted to propose a standard for toy chest lids to alleviate the risk of strangulation or serious injury to small children. The Commission has also decided to adopt a labeling rule in recent weeks for wood heating equipment when it was determined that a high percentage of fires involving these heaters had been caused by improper maintenance and installation. CPSC has developed 35 mandatory standards or bans in its 10-year history.

Mr. Chairman, when a danger is posed by a defective product in the marketplace, or in consumers' hands, it is also the role of the CPSC to investigate and initiate corrective action to eliminate or reduce the hazard.

Through the decade of the Commission's history, 3,174 recall actions, generally with cooperation from the industry, have removed many products which contained defects creating substantial risk of injury. Over 1,100 of these actions were taken under section 15 of the CPSA, which empowers the Commission to remove "substantial product hazards" from the marketplace.

Perhaps one of the most successful examples is a recent recall of a product which violated a safety regulation, was the voluntary action of McDonald's Corp., working with CPSC, in calling back 10 million toys already distributed and halting the distribution of 20 million others. Their action was taken within 24 hours after being notified by this agency that the miniature toys posed a potential choking hazard for children under 3 years of age. Recall of hazardous products are a quick and economic method of coping with a clear emergency.

In conducting our responsibilities for consumer product safety, CPSC also has, in addition to bans, recalls, labeling, and standards, the overall tool of information and education. Since many injuries



are not the result of product design or defect, it is essential that consumers know the proper usage and safeguards for the things they buy. In this regard, we have had considerable activity and success. Among our recent outreach programs are the smoke detector program, the national toy safety program, and the "National Poison Prevention Week" activities that we did in cooperation with President Reagan at the White House.

Prior to our appearance here today, the Commission responded to the subcommittee's inquiry concerning any changes we would wish to be made in our authorizing legislation. In our letter of reply to you, we listed two essential features that we view as desirable.

First, the Commission favors a 5-year reauthorization with congressional assurance of adequate budgeting and personnel levels. While we are always pleased to come to Congress, it is an intensive effort for an already reduced staff, as well as for the Commission, to prepare the complete review of our enabling legislation in alternate years. We feel that routine congressional oversight should be sufficient to monitor the performance of CPSC. A lengthier reauthorization period would also make it highly desirable to have stated assurances of personnel and authorized budget floors.

Although inflation is much less a problem in 1983 than it has been in recent years, it has not been eliminated and should be recognized in projected authorized budgets. Similarly, a realistic personnel floor should be recognized for the agency, particularly as our responsibilities grow.

Second, the Commission favors an amendment to section 6(b) of the Consumer Product Safety Act governing public disclosure of product information. As that section of our enabling legislation is now framed, our ability to release, under the Freedom of Information Act, any product information identifying a manufacturer or private labeler is severely restricted and demands a very heavy investment in agency resources.

In conclusion, Mr. Chairman, I realize the constraints of time prohibit a detailed review of this or other issues in these opening Commission remarks. However, we are submitting to you for the record several issue papers which set forth our views on the following: One, the accomplishments of CPSC; two, the 1983 and 1984 priorities of CPSC; three, the 1981 amendments to our enabling legislation and the implementation of them; four, a 6(b) public disclosure briefing paper; and last, a CPSC hazard program projects overview.

At the conclusion of the other opening remarks, I would be delighted to answer any of your questions.

That, Mr. Chairman, is the view of the Commission as a whole. I do have just a few personal comments I would like to make, if it is your wish.

Senator KASTEN. If you would like to, why don't you go ahead and make the additional comments at this time, and then we will ask Sam and Stuart and Edith and others to make comments as well.

Ms. STEORTS. Thank you, Mr. Chairman.

First, just a little bit of background. When I assumed chairmanship of this Commission 18 months ago, I was presented with a re-

duced budget and staff that required reorganization. In many ways, I feel the Commission is now stronger and more viable because of this reorganization. We have indeed moved in new, increasingly successful, and cost effective ways to protect the American consumer.

The basis for this reorganization was a management philosophy that placed emphasis on working with industry instead of against it; a preference for voluntary instead of mandatory regulations, although I will mandate if necessary; and a belief that programs to educate and inform the consumer are necessary to carry out our safety mission.

I believe that this approach has resulted in real progress. Our improved relations with industry I feel also constitute a major success. We have had many industry briefings before the entire Commission that I feel have worked out extremely well. We have heard from toy chest manufacturers, kerosene heater manufacturers, consumers and consumer groups, chemical manufacturers, certifying laboratories, and a variety of trade associations.

These meetings, I feel, have brought to us information and concerns of those who have testified before us. Time and money have been saved by understanding problems in time to devise solutions. In other words, industry, business, and the consumer are involved in the decisionmaking process at the CPSC at the earliest possible stage. I believe that this achievement has already had important safety payoffs.

The voluntary approach at CPSC is indeed working. These successes that we have seen with the furniture industry, the juvenile products industry, and the electric blanket industry, to just name a few, I feel have certainly shown that industry today is indeed taking their product safety responsibilities seriously.

I also believe that the CPSC should protect the consumer through strong educational and information programs. This, too, has been achieved, and there are many examples of this that we would be delighted to include for the record.

What is the reaction from consumers? The American consumer also thinks that we are successful. In the recent Harris poll, "Consumerism in the Eighties," CPSC is the only Federal agency listed that received a clearly positive rating on protecting the consumer. This survey presented these three facts:

It showed that 62 percent of those surveyed felt that products are safer now than a decade ago; that consumers believe that labeling and information about products have improved; and that 85 percent approve of Government protection against products that are dangerous.

However, the need for the Consumer Product Safety Commission is shown not just by the success stories of cooperative voluntary industry/consumer/Commission efforts and the appreciation of America's consumers. The need for this agency, I feel, to be reauthorized is also demonstrated by the fact that our work is certainly not finished.

I intend to continue to encourage voluntary safety measures by talking directly with corporate executives, by having consumer complaints sent to manufacturers as soon as the Commission is aware of them, and by expeditiously holding special meetings so

that potential problems can be aired in a forum of constructive cooperation.

I believe that the Commission should continue to protect the consumer through strong information programs with the help of industry. Consumers need to be told how to install, use, and maintain a wide range of products, power tools, heating equipment, electric appliances, to name just a few.

Finally, we need to continue our cooperative research to learn about possible carcinogenic risks, and to find out about emerging hazards. As new products appear and as our knowledge increases, sometimes new hazards are discovered. The Consumer Product Safety Commission I feel is needed as a catalyst, and we will continue to be needed until we no longer have to mandate regulations and impose fines, until all manufacturers voluntarily anticipate children's vulnerability and, for example, put safety devices on toy chests without a Federal requirement, until all manufacturers understand the consumers need for instructional information and, for example, see that coal and wood-burning stoves are adequately labeled without a mandatory regulation, until all firms immediately report safety problems and take quick, effective steps to warn the public and recall products that present substantial product hazards, and until the marketplace becomes self-policing.

In conclusion, the Consumer Product Safety Commission has offered much-needed protection to consumers during the 10 years of its existence, but the Commission's work is certainly not yet finished. The formula for success, I feel, has been created. Now we must be given a lease on life to continue what has been started.

Thank you, Mr. Chairman.

Senator KASTEN. Thank you, Nancy.

Edith, or Stuart, or Sam?

Ms. SLOAN. I do not mind being last.

Senator KASTEN. We will start off with Sam. Sam, do you have any additional comments?

Mr. ZAGORIA. Yes, sir. I would like the opportunity.

Senator KASTEN. You are still our amusement park expert, too.

Mr. ZAGORIA. Yes. I was going to get into that.

At the risk of losing out on our chance to win the award for being the most modest agency around, I do want to say that there still are an awful lot of things to be done.

I think Americans generally want to feel secure in their daily living. The stories that we now have in the papers about hidden and unexpected hazards, such as dangerous chemical dumps things make people concerned about what it is they are being exposed to every hour that they exist. It is important to realize that some of these same chemicals that are turning up in the chemical dumps are also being used in consumer products.

It is important not to scare people into thinking that these things will lead to death and injury, but it is important to realize that unless we develop the kind of scientific and technical expertise to cope with them, we cannot make sure that the consumer products are adequately produced in ways that are safe and will leave people secure.

One of the problems we have to deal with, as the General Accounting Office pointed out, is that we have lost 32 percent of all of



our scientific and technical personnel in the past 2 years. These are the people who can help us save lives and avert injuries to consumers, and their work can avert multimillion dollar product liability suits for manufacturers.

Preventing tragedies is a lot cheaper for Government and for industry than paying for them after the fact. Our total budget is in the \$30 million range. The amount the Government is going to spend for the residences of that little town in Missouri hit by dioxin is going to represent more than our total budget, and yet there are going to be people who have been exposed to those chemicals for a 10-year period.

When a health and safety agency does its job, it is a job that will save Government, that will save commercial firms, and, most importantly, will save the victims. So I am strongly in favor of adequate staffing, adequate appropriation, and adequate time for reauthorization.

The second point I would like to get into is some improvement or at least modification of the 6(b) provision. This provision, limiting the release of information received by the Commission, has practically closed down the sharing of consumer complaint information with members of the public. The limitation goes further. For example, without prior express agreement from a manufacturer, we cannot even respond to an inquiry about "how is this recall on this dangerous product going?" Or even to share a newspaper clipping about a recent infant death in a product on recall.

There are a number of other examples which I have included in my prepared text and which I certainly hope will be read, but it is difficult, looking at 6(b), to square that with the congressional mandate that is now 10 years old for the Commission—and this I am quoting from the statute—"to maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data and information, relating to the causes and prevention of death, injury, and illness associated with consumer products."

The third subject, as you predicted I would want to talk about, is trying to get back our jurisdiction over amusement rides, that is, the fixed site amusement rides. Our staff estimates that 14,000 persons were injured on amusement rides—mobile and fixed site—in calendar year 1981, which is a substantial increase obviously from an estimated 10,000 in 1980. From 1973 through 1981, there have been 55 deaths involving amusement rides.

In our last reauthorization, Congress removed jurisdiction over fixed site amusement rides from CPSC. There were a number of arguments made that the fixed site amusement parks were sufficiently regulated by local authority and that the parks upheld a high standard of maintenance, training, and insurance.

The unfortunate facts are that only 21 States out of the 50 have any amusement ride regulation at all, and fixed sites are covered only in some of that 21. The actual experience since that amendment took place has been that there have been serious accidents recorded at several parks, and presently we have no authority to even investigate them. Let me cite just a few examples from last summer.

In Ocean City, Md., an operator was killed when a "Super Loops" ride ensnared him and flung him to the ground. In Red-



wood City, Calif., two persons were seriously injured on a "Birdie Glide" ride. In Vernon, N.J., a young man was electrocuted on a "White Water Kayak" ride. In Orlando, Fla., a youth drowned going down a 60-foot water slide into a 5-foot depth.

All of these incidents were at fixed sites and unless Congress revises our authorization, we cannot even investigate them, much less regulate them.

After I wrote my testimony, I received a report from the west coast that Disneyland had a very serious accident last Saturday in which an 18-year-old was taken to the hospital with head and back injuries when he apparently fell out of a "Space Mountain Rocket" car and was found 4 to 5 feet below the tracks near the end of the ride. That ride incidentally gets up to speeds of 32 miles an hour through a darkened, simulated outer space environment. However, the problems of last summer were not unique. We have had serious major accidents in a number of parks earlier.

One of the things I think it is important to realize, in just the incidents I have given you from last summer, is that a number of States, including California, look at mobile rides only and do not deal with the fixed site rides. So there is really no one to protect the public interest other than the operators, and any insurance firms that they may have. Unfortunately, accidents are continuing to occur.

I think if we could get back that jurisdiction, we could assure that the people who purchase rides from this business, which is a substantial one of about a billion rides sold each year, would have the protection of Government, too.

In conclusion, I have tried to keep my requests few in number and modest in nature, but if I can help by providing any further information, I would be delighted to do so.

Senator KASTEN. Sam, thank you. You understand, but I want to make sure that other people in the room understand that the question here is not whether or not we are in favor of accidents in amusement parks; the question is whether an amusement park is a consumer product and whether it is a State or a Federal responsibility. Those two questions are debatable, but I am interested in the statistics that you just reported because I do think they are significant.

Mr. ZAGORIA. I attended a meeting of the State attorneys general from around the country. I talked to them about amusement rides. I said, what are you people doing now that Congress has removed us from jurisdiction over your amusement parks? A couple of them said to me, "Sam, we can barely enforce the laws that we have now. We are not going out of our way to take on a whole new area of enforcement, particularly an area that requires a great deal of manpower and expertise."

So the riders and the parents who take their kids down to enter into these rides and have the excitement and the thrill assume there is some kind of protection taking place, but there is not in 29 of our States. Even in the 21 some laws are outmoded. I testified before the New York State Legislature in favor of trying to get them to take another look at their amusement ride legislation. It was 20 years old. In Texas, I testified in their legislature. They had

no legislation at all, and still do not have it. My testimony obviously did not sway them.

Senator KASTEN. Who is next? Edith?

Ms. SLOAN. She who is last will be first.

Senator KASTEN. We were going to go boy, girl, boy, girl, I thought.

Ms. SLOAN. I was going to be last so I wouldn't have to speak so long, knowing that they would cover all the points.

I will refrain from reading my paragraph on 6(b) and defer to my colleague, Commissioner Statler, whose views on section 6(b) are similar to my own. I must say, though, in the 5 years that I have been a member of the Commission, and, from the point of service, as a senior Commissioner, I am not making any admissions here, any personal admissions—I missed that one—but speaking as the senior Commissioner, I can tell you that short-term authorizations of 1, 2, or even 3 years amount to a kind of Sword of Damocles. They do nothing for the staff's morale, encroach substantially on the time of Commissioners, and devour resources.

The present 2-year authorization is actually a shorter time than it takes on the average to promulgate a standard or a rule. After three reauthorizations, I can tell you that it is an exhausting proposition. You look with horror on having to go through this again, especially after a year or two years. Once I think I had the opportunity to have 3 years without a reauthorization. Besides, industry is not unaware of this, and in those instances where it is inclined to foot drag, the short statutory life of the Commission provides an incentive to do just that. A brief authorization is in my experience seriously counterproductive to the Commission's ability to discharge its congressional mandate.

Since in all probability this will be my last appearance at a CPSC Senate reauthorization hearing, I will ask the indulgence of the committee as I make an observation or two which may help in your current or future discussions.

First, I respectfully suggest that this committee can derive a certain satisfaction from the Harris public opinion poll released last week, which Chairman Steorts spoke of. As you know, it ranked the Consumer Product Safety Commission, which is this committee's creation, in part, and certainly one of your responsibilities, first among all Government agencies involved in consumer protection.

I know that I found a measure of personal gratification—I am not being immodest; after 5 years, I thought that this could be permitted—in learning from the poll that those days of frustration and nights of despair, and I think I counted 1,800 of them, were not all in vain; that a significant number of American consumers are aware of the CPSC and hold a positive view. I believe that in this poll there is much food for thought.

I found in those tables numbers which bolstered my conviction that consumer product safety has only begun to be a force worthy of notice. For example, private industry efforts in protecting the interests of consumers were perceived negatively by 57 percent of the people polled. I do not believe that kind of reaction comes from inborn mistrust. I think it is the result of life experience.

Those figures tell me that the CPSC must be made stronger, must be allowed to demonstrate that it is not a paper tiger, and that the Congress did not pass this legislation in a moment of whimsy, but because it found that "an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce."

Finally, I would like to submit for your consideration two observations of the polltakers. They found, and I quote:

The overall picture of black consumers that emerges from these figures is one of a group that seems particularly vulnerable to and concerned about consumer problems, and that is an ally of those who press for more government regulation.

They also found that:

Groups most likely to perceive deterioration (in the consumers' world) include women, persons aged 50 and over, blacks, and individuals with incomes of \$15,000 a year or less.

For me, these observations tell less of how the marketplace is viewed by minority and low income consumers and women and the elderly than how these groups are viewed as a market.

During my tenure on the Commission, I have tried to give special attention to those consumers who by circumstance are more vulnerable to risk than the population as a whole. As the Commission's resources have dwindled, so too have the means to reach out to special population groups. As long as that condition prevails, a large segment of American consumers will be unfairly victimized by benign discrimination.

I give you that thought to carry into your future deliberations. Thank you.

Senator KASTEN. Edith, thank you. I appreciate your comments in terms of the authorization/reauthorization effort. As you know, it takes time and effort on our side as well.

Ms. SLOAN. Yes.

Senator KASTEN. On the other hand, I think that this year some of the questions we were faced with a year or two ago are gone. There is no longer a thrust to disband the agency. There is no longer a thrust to combine it with another Government body or agency, and I think that we are in a position from which we can kind of go forward on a firmer, more stable basis than we might have been able to a year or two ago.

Whether it is 1, 2, 3, or whatever years, I think we are in a slightly different position both from the point of view of the Commission and also from the point of view of the Congress. The legislative intent, the understanding of the administration's position, all these issues are more stable than they were a couple of years ago when we began this whole process.

But I do appreciate it, and I understand your comments and your concerns.

Stuart?

Mr. STATLER. Mr. Chairman, I have to say that I am very pleased to hear you say that. We were hoping that was true, but to hear it from a chairman whom we have a great deal of respect for helps to assuage some of the concerns that we as Commissioners have, and certainly that our staff has. Going through reauthorization can be a very tumultuous experience for staff. I know when I worked on



the Hill, I had no idea that the reverberations would send shock waves throughout an agency whenever a reauthorization came up.

I want to limit myself really to two areas: One, the notion of an extended tenure; and two, to highlight some of the problems associated with 6(b) that unduly restrict us from promptly alerting the public to emerging safety concerns.

On the question of extended tenure, each time the Commission comes up for reauthorization it really does take a tremendous amount of effort, yes, on your part, and on our part, too. It is for that reason that we are hoping you would consider that what we regard as a too-short period of reauthorization can be extended somewhat this time. I think from your comments the period of adjustment that we have made justifies the notion that the agency can go on and continue in the way that we have continued under our Chairman and under the leadership of my two colleagues from whom you have already heard.

In the past, we have repeatedly had to reestablish our very basis for existing. That really diverts agency resources away from pressing safety concerns. A great deal of staff time and expertise must address anew each time what the agency has been doing and why it should continue responding to these questions.

We want to be as fully responsive as any agency possibly can be both to you, the Congress and to the American people. That takes a lot of time. The sheer volume of material produced is hard evidence of the prodigious effort that we expend to detail this agency's record.

For each reauthorization, several hundred pages are developed to answer House and Senate committee inquiries. Reams of testimony and supplemental responses are readied. Meetings between our staff and yours, between us and your staff, really do take a great deal of time. Amongst ourselves, extended discussions concerning reauthorization lead us away somewhat from even the priority matters that we are addressing.

The effect on staff, as I indicated to you, can be worse. Every once in a while a rumor comes by, and the staff believes it. Reauthorization can generate both anxiety within the agency and turmoil. Staff morale can plummet whenever the agency is seen to be twisting in the wind. We have lost good people because of that, and we often cannot find suitable replacements. Staffers see efforts planned to resolve safety concerns being sidetracked sometimes for months at a time because of these reauthorization efforts.

So I would urge you that an extended reauthorization period of perhaps as much as 5 years would go far in redressing this problem. It would give the agency an adequate period in which to dedicate resources directly to resolving critical product risks. It would imply a congressional imprimatur, far stronger than ever before, signalling "We are behind you, CPSC, and we want your important mandate to be fulfilled." Congress would obviously retain, as you always have, tight control over the agency appropriately through periodic oversight hearings, both on policy matters as well as on any specific hazard or topic.

I would like to turn now to the disclosure area. I am not going to take up your time on the key area that our General Counsel will be addressing later on, and most of the panel members will be ad-

dressings, that is, release of information in response to FOIA requests. I really want to make it clear that CPSC is the only health and safety Federal agency which must undergo what are often egregious delays before disclosing vital safety information.

If similarly bound, NHTSA and the Department of Transportation could not timely notify car owners about defective tires and brakes; and the Department of Agriculture would be precluded from promptly warning about tainted meat and dairy products.

I strongly urge this committee to redress the terrible imbalance in our statute which gives greater emphasis to a company's concerns about unfair or misleading information than to the public's right to know about serious product risks.

As I said, the General Counsel will be addressing the question of the application of 6(b) to FOIA requests, but I would just like to make clear that that is not the whole problem. There are other aspects of it that need to be redressed in terms of our desire to get information out to the public about emerging product risks.

For example, 6(b) safeguards were intended to protect firms from unmerited adverse publicity coming from the Commission. Yet today neither the agency nor even an individual Commissioner can even congratulate a company in public for its cooperation or for a well-run recall campaign without first jumping through 6(b) hoops.

The inapplicability of 6(b) to release of other than adverse information should be clarified. Positive or neutral reference to a firm or its product probably was never meant to be covered. But currently, even to list an X company as one of 20 manufacturers of lawn mowers or chain saws, or whatever, involves submitting the list ahead of time pursuant to 6(b) for the company's comments as to accuracy and fairness. Indeed, a very futile exercise.

Second, because of 6(b), Commissioners are restricted from making known their dissent from an agency decision involving a negotiated corrective action plan or any other such matter that does not involve a formal "proceeding" in its most technical sense.

If a Commissioner feels strongly that a vote to accept a proposed recall plan was in error, the reason should be disclosed to the public. But, as presently constituted, 6(b) requires a dissenting Commissioner either to stay silent, to skirt around identifying the company or the product in question, or to trudge through the time-consuming 6(b) review process with a firm that will inevitably cite the "unfairness" of any such contemplated action. None of these options is palatable for a Commissioner like myself who is charged by law with the responsibility for protecting the public from any unreasonable risk of injury.

Third, Congress should make clear that 6(b) does not apply to information that is already in the public domain, like newspaper or trade journal articles, or citations from respected reference manuals. It is difficult to believe that taxpayers' money is well spent copying and forwarding pages, for example, of a Standard & Poor's listing, from a Commission file, to companies for their review and comment as to accuracy and fairness.

Fourth, questions about disclosing information pertinent to recalls should be cleared up. Section 6(b) should not preclude the CPSC from informing the public about the existence of a recall that may have already taken place several months back, or the ef-

fectiveness of a recall in terms of how many or what percentage of the products were sent back or corrected. Like the FDA, we should be able to make available cumulative listings of recalled products. The public should know as much about potential consumer product hazards under our jurisdiction as it does about poisoned Tylenol or tainted mushrooms.

Fifth, and finally, when we do conduct a recall, we should be able to move quickly if the campaign does not work. Suppose we are not satisfied that consumers have either received the initial notice or acted upon it. Right now, there is some question of whether we can even repeat an alert like a negotiated recall notice, without again seeking the firm's permission. Some firms have argued that rerelease requires us to run the message through the 6(b) drill once again. This means additional delay while the potential for tragedy is ever-present.

The fundamental disclosure issues I have attempted to describe today really cannot be resolved as between CPSC and industry. They are tied to the explicit language which Congress has set forth in section 6(b) of the Consumer Product Safety Act itself. The law needs to be changed if we are expected to satisfactorily carry out our mandate to rid the marketplace of unreasonable risks of injury.

Letting the American public know early on about hazards or risks that we know about is essential to their informed choice in buying and using consumer products. Moreover, Mr. Chairman, letting the public know early about hazards and risks is essential to our responsibility to the Congress and to the American people, as was originally intended when the CPSA was enacted.

Thank you for your time.

Senator KASTEN. Stuart, thank you also. You said you were having difficulty in congratulating companies or groups that have had a successful recall. It seems to me that you were able to congratulate McDonald's for its recall of the promotional toys, and everyone understood that that was a successful effort, and you and the industry worked together, and you were able to publicly talk about that. Do you want to expand a little bit on that?

Mr. STATLER. When we worked out a recall campaign with McDonald's, we had their permission to talk about the firm. However, in the absence of a firm's permission, our General Counsel's office has informed us that any mention of a firm, not simply adverse comment, but any mention—positive, neutral, or adverse—means we must first get the firm's permission.

In the case of McDonald's we, in fact, had the firm's permission.

Senator KASTEN. Right. The McDonald's recall seemed to me to be an example of success, done the way people would like.

Mr. STATLER. But there we had their permission. For example, if I want to commend a company for having worked with us on poison prevention packaging, I would first have to go to them and make sure it is OK with them before I give a speech and comment favorably about that company.

Senator KASTEN. I want to just briefly emphasize voluntary standards. In the last reorganization, the Congress directed the Commission to emphasize the development of voluntary standards.



I would like to ask each of you: What has the Commission done to implement these congressional changes? Even more importantly, now that you are emphasizing voluntary standards, what kind of a level of compliance with the standards are we achieving?

What kind of a level of compliance would satisfy the Commission? In the industry, are you satisfied with a certain percent? Are you getting half the people, three-quarters of the people, 90 percent of the people, 100 percent of the people? If you have found yourself in the position of working with an industry that was, let us say, 50 percent complying, would that be success or would that be failure? Would 75 percent compliance be success or failure?

What do you do with that remaining 10 percent or 5 percent or 1 percent that may not be complying? If several companies in an industry do not comply with the voluntary standard, at what point do you feel it is necessary to come in with some other course of action by the Commission?

It is a whole kind of series of questions, but they are all the same. One of the key things that we worked with was to try to see if this process worked, and I would just like each of you to respond to those points. Nancy?

Ms. STEORTS. Mr. Chairman, one of the overriding concerns of the Commission is that we do look to work with the voluntary approach to Government decisionmaking at CPSC. I think we have had a good degree of success. I would like to give two examples, and I am sure my colleagues will give others.

The first example is one with electric blankets. We have had quite a lot of problems with electric blankets causing fires. I am very happy to report to you that we have 100 percent compliance on the electric blanket voluntary standard. That is what I would consider unusual, but I do think that as far as compliance with voluntary standards, we really have to look at it case by case.

An example of where a voluntary approach did not work was with the wood-burning stove program. All we were trying to do in the wood-burning stove issue was to get the wood-burning stove industry to put this simple label (holding up a label), which is a label to show how to install correctly a wood-burning stove in order to prevent the tremendous increase in fires that we had seen over the last year.

We worked with them very, very closely. Our staff worked with them. We also brought them in for a meeting with the Commission. I am sorry to report to you that we did not get good cooperation from the wood-burning stove industry.

I think one of the problems was that only 100 of the 300 manufacturers belong to the Wood Heating Alliance, which is their trade association, leaving 200 companies that were not part of a trade association. I think that had an effect, and unfortunately because we did not get good compliance from the industry, we had to go to a mandatory rule.

Senator KASTEN. Was that because it was a new, emerging industry, if you will, or was it because it was an industry that was just kind of not together?

Ms. STEORTS. I think it is an industry that is not totally together. We had good cooperation from the Wood Heating Alliance, which is the overall trade association, and 100 of the manufacturers

belong to that. There are 200 who do not belong, and through the efforts of Carter Kiethley, their executive director, I think they have worked very, very effectively with us, and they are now working very closely to get the mandatory standard into compliance, but those are two examples. One was a real success story, and the other was not.

Senator KASTEN. I do not want to take a lot of time, and we have two other groups that are coming, but what is the threshold? At what point do you decide that the industry cannot work with you? In this example, you had a majority of the people who were going out on their own that were not part of the association, and essentially were not participating in the whole voluntary standard effort. Is that right?

Ms. STEORTS. That is right. There is no threshold, Mr. Chairman. We really have to look at it case by case. In some instances the effect of the problem is so serious that you really need 100 percent compliance. I assume my colleagues would agree with me. You really do have to look at it case by case.

Ms. SLOAN. Could I add to that?

Senator KASTEN. I would like for each of you to comment on this whole set of questions, because it really is one of the key important changes that we made and, I would say that I think you have been reasonably successful making this change; but I would like to understand your thinking and how you are dealing with these sets of questions. Edith, why don't you go ahead?

Ms. SLOAN. All right, if I can remember all of the questions. Let me take toy chests as an example. That is one that we have been wrestling with recently. It is a product where the hazard really sneaked up on us. There have been 21 deaths, 2 serious injuries, mostly serious injuries from the lid banging down on the child's head. The deaths caused by strangulation were mostly among children between 10 months and 2 years. This is something that our staff became aware of, when they started keeping statistics.

From 1973 until this time, the fatalities accumulated very slowly. The staff went to the industry. They got little response. The injuries and deaths were finally brought to the Commission's attention in 1979, and again we asked the staff to try and work with the industry. This is something that should be voluntary. It is a very simple little safety hinge which costs about 65, 67 cents, something very simple to do. Let us see if we can get industry cooperation in this.

A majority of the industry at that time members of a trade association, so we got nowhere. We called for meetings and got absolutely nowhere. I think at one meeting called by ASTM, 30 odd manufacturers were asked to come, and maybe we got fewer than 5, 2, or 3.

Finally, we announced that we were going to have to consider doing something serious, consider a mandatory rule, and they started becoming interested.

We are at the point now where we have proposed a mandatory rule simply because we are not convinced that the industry will work with us in a forthright manner, that all of the toy chests coming off the assembly line or in channels of commerce will be fixed or retrofitted, and we are also concerned that there are im-

ports, that can be a lethal hazard. They can cause a child's death. It is something you do not think of.

I tested the toy chest which our children use, and if it had fallen on one of them it would have seriously injured or killed one of them. So this is something we have struggled with and struggled with, and after nearly 4 years, we finally had to say to the industry, we cannot go on this way.

Another child was killed in October. We have a whole pile of bodies. At that point, the Commission decides. Sometimes I get very upset, and I know my colleagues do, that we have to wait until that point. We should be able to prevent some of these things, but you have to have a willing industry. You have to have a cohesive industry. You almost always have to consider a mandatory rule if the industry it is not cohesive, and it is not cooperative. I hope that helps.

Senator KASTEN. Stuart.

Mr. STATLER. I think, Mr. Chairman, there is no magic number, at least in my mind, as to what constitutes "substantial compliance." As Chairman Steorts has indicated and Commissioner Sloan has implied, it is done on a case-by-case basis.

Some of the considerations that go into at least my thinking involve the severity of the risk, the frequency of injury, the nature of the industry, how cohesive it is and what we can expect of it, the reasonableness or the practicality and the cost of complying with the standards, and finally, and perhaps most important of all, Mr. Chairman, our perceived commitment of the industry.

For example, in the case of UFAC, the Upholstered Furniture Action Council. When we decided to give up on the mandatory route and go with their voluntary effort, they really represented only 80 percent of that industry.

Edith just gave you an example of toy chests where, at least as of this point, we are told 80 percent would comply. But, there is a big difference in our minds, or at least in my mind as to the commitment of those toy chest makers versus the commitment of UFAC. Both are 80 percent or thereabouts. At this point, UFAC now represents about 90 percent of the industry. They have shown every signal of complete and full cooperation, including sharing of test results, attending meetings together, and full participation in a joint effort.

In the case of the toy chest industry, it struck me as very strange that when we asked individual makers to come to a meeting here just several weeks ago, there was only one manufacturer directly represented, and one who was represented by an attorney. Some 28 other manufacturers refused to come. Now, that does not represent to me the kind of commitment that an industry should show.

So, all of those factors come into account in talking about what constitutes substantial compliance.

Thank you.

Senator KASTEN. Sam, would you be good enough to comment on this general area as well?

Mr. ZAGORIA. I would be very happy to. I share the views that have been expressed. I think the best measure of how we feel is how we act about voluntary standards. In the past reauthorization period, as I recall I think we have only had votes by the Commis-



sion for two mandatory standards. At the same time, we have had, as the chairman indicated, 19 new voluntary standards completed and 38 more are under way.

Now the criteria, as several of the Commissioners have indicated, are very important as to whether you can really develop a voluntary standard. Despite the most willing attitude on our part, if the industry is so constituted that there is no central organization that can help to develop the standard and enforce it, the Commission really has no choice other than to go mandatory.

It is important also to recognize that many times there are great divisions within an industry as to what constitutes safety, and how to go about it. In those cases, you are almost forced into a situation where you have to bring order out of chaos and develop a mandatory standard. We may be facing something of that kind in the chain saw development. We have been working on it for years and years. As a matter of fact, the initial effort was by the Chain Saw Manufacturers Association.

Until they can come up with a standard which adequately deals with the kickback phenomenon, and then go on to deal with other aspects which have caused 30,000 serious injuries every year, we are in a position where we have to continue the parallel development of the mandatory standard.

Now sometimes when we say that we are going to pursue the mandatory standard, that really is the club in the closet that is intended to push the industry to coalesce behind a realistic standard. At the end of the road, it may very well be that we will defer the mandatory standard and approve the voluntary standard. This is the circumstance in upholstered furniture. We started out toward a mandatory standard, and the industry has showed a great deal of energy in trying to develop a voluntary one, and it may very well be at the end of the road that the voluntary one will really suffice.

There are sometimes circumstances beyond our control. Take the UF foam situation where there was a trade association in place, but each time the product was made it was not an assembly line kind of thing where you could exercise quality control. On every site, every home where it was made, the product was newly constituted. It was very difficult to develop any kind of a standard that could either work or be enforced.

I think the attitude of the Commission—and I am sure I speak for all four of us—has been that we welcome the opportunity to develop a voluntary standard, but we have to look at the criteria as to first of all can they evolve a realistic standard? Second, can they enforce it?

No one is saying 100 percent is the way to go, but we do have to look realistically at whether something meaningful can be achieved. In some cases, I suspect industries are almost relieved when we tell them in public: Look, fellows, get your act together or we are going to go mandatory. It is a way to help some of the association executives who are sitting behind me, to help pull their dues-paying members together on a safety track, instead of on one where each one says, well, I am producing a safe product, do not worry about me, buddy; and then someone says, well, what about all those injuries in the emergency rooms of hospitals, and the fa-

talities? How are they occurring if everybody is doing the best they can to achieve safety?

Senator KASTEN. Thank you.

Obviously, this is not a simple issue, and it seems that there is no threshold, and that there is no magic percentage, and that there is no magic answer, but I think that we can look back to the last couple of years to see that you are moving in the direction that Congress intended. It also seems to me that you need the authority for that mandatory standard in place in order to make the rest of the system work.

Mr. ZAGORIA. Absolutely.

Senator KASTEN. And I think you can be proud that the system seems to be working.

One of the things we have talked about a number of different times is the location of the agency, and whether you should be in two different places or whether you should be in one place. I do not care where you are, but it is my feeling, and it is also the feeling of a number of the Members of Congress, that being in two different places has got to be foolishness.

What is your feeling, Nancy, regarding the consolidation of the agency's offices either at the Bethesda location or at the downtown location? I am not sure that that is a possibility now, but one way or the other, could you just address that question very briefly for the purposes of the record?

Ms. STEORTS. Yes; I will, Mr. Chairman. I know you asked that of me at the last oversight hearing. I would like to say at this point that the Commission has made considerable progress since our last discussion of this. As a matter of fact, President Reagan even recognized the progress we have made in the consolidation effort. Most of our staff is now in Bethesda—with the exception of one, which is our director of media relations—in the location in the Westwood Towers Building.

We have our laboratory in Darnestown. We have another laboratory we share with the FDA. The Commissioners, are located in the Logan Building, on the eighth floor, at 1111 18th Street in NW., in Washington. It would be my desire as one Commissioner to have us all together. I think it is very important. A tremendous amount of savings would result if we combine our resources in one building.

Because almost everyone is now in Bethesda, I would prefer that we as a Commission move to Bethesda. I know my colleagues do not agree with me on this, and I certainly think they should have an opportunity to speak to this.

Senator KASTEN. I do not care where you are, but it just seems to me—I would be happy with everybody downtown, or somewhere in between, or somewhere out there.

Ms. STEORTS. Because the other three Commissioners do want to be in Washington, we are continuing to look for space in Washington.

Senator KASTEN. And move everybody back in from Bethesda?

Ms. STEORTS. Into Washington. However, this is a situation that takes a Commission vote, and I think I would like to ask my colleagues to speak to this, but I would like to put on the record that I do feel that we need to be consolidated in one place, and because the staff is in Bethesda, it is easier for us to go to Bethesda.

Senator KASTEN. I am anxious for other comments, but when you have an issue like this which is easy for everyone to understand, and a number of the Members of Congress understand it and are aware of it, it seems to lots of Members that it is crazy to go back and forth and in and out and not even knowing where your office will be the next 6 months, and all the discussion, and all the kind of politicking and time wasted in terms of trying to figure out where you are going to work.

It seems to me that in keeping with the comments that all of you made in terms of stability and dependability with the agency, that one basic point might be to have one place where you are sure you are going to be going to work, and to get that over with and stop all the rumors and the efforts in that way.

I do not care where you are, and I do not think many people in Congress do. What they are concerned about is that this whole issue somehow should go away. If it means Bethesda, if it means Washington, if it means a new office building downtown, I do not know. I do not want to know all the details, but the fact that this issue just keeps popping up is something that undermines your stability and, frankly, your credibility.

Let me ask any of you who want to respond. Sam? Stuart? Edith?

Mr. ZAGORIA. I would be happy to respond. I would be happy for you to get other comments as well. I do not think any one of us is opposed to the concept that we all ought to be under one roof. Part of the problem though lies with the people who give us probably our best exposure of the information that our technicians, specialists, researchers manage to come up with; namely, the media.

The media does not come to meetings in Bethesda. It does not come out to meetings with manufacturers, meetings with staff, the kinds of things that have enabled us to get, thanks to them, free information distribution, the kind that if we had to substitute in terms of paid information, whether it be advertisements, pamphlets, or whatever, would amount to thousands and thousands of dollars.

We have tried very hard to carry out a continuing rapport with the Bethesda operation by scheduling at least a meeting or two a month over there. Individual Commissioners spend a lot of time in Bethesda meeting with staff and meeting with interested parties that come to Bethesda.

If we could get everybody together in an area where the media would give the same kind of attention to the hazards, to the recalls, to the developments that we have come across in our work, it would be fine; but the problem is, as we know from actual experience, the meetings in Washington get covered; the meetings in Bethesda do not.

Mr. STATLER. Just to supplement that somewhat, there is a concern about getting our message across. There is also a concern about having access to the groups here in town, both industry and consumer groups, with whom we most have to deal. We have been told by them, too, that they do not prefer to come out to Bethesda.

So over the last 3 years that I have been on the Commission, we have made a concerted effort through GSA, whom we have to deal with, to get a downtown location. I have to tell you, Mr. Chairman, they kind of thumb their noses in our face. We are down at the



bottom of the totem pole from their standpoint. And even with many Government agencies now giving up space, they are unwilling to try and look for space for us downtown that could move everybody into one place.

Sam and Nancy are both right. We all want to be under one roof. But there are negative considerations that have to be taken into account about moving entirely to Bethesda. There is the media's unwillingness to go out there, as well as the unwillingness of the business people we deal with, and the unwillingness of the consumer groups to travel out there. So, if we are isolated out in Bethesda and are not having the day-to-day contact with the people we most have to have contact with, then we cannot be as effective in fulfilling our mandate.

Ms. SLOAN. If I could just add to that, I think that we are known by many consumers now, and we do receive a favorable rating because we have had the exposure which we have had in the last few years, and because we have been accessible.

The location in Bethesda is isolated. It would take buses. There is no Metro near there or anything, and it is just not a place where an agency with a public mandate for a public mission such as ours should be located. It is isolated. It is out of the center city. It is out of the seat of Government.

If we were purely research, that would be different. We would need the quiet. But we need to be in the center of the city where we have access to people and the people have access to us. This is Washington, D.C. They used to say it was too expensive, but now with the glut of rental spaces it should not be. We still do not get any cooperation. I have been looking at it for 5 years, and I wish it would go away. I wish they would find one place for us.

Senator KASTEN. This should not keep coming up each time we have these different hearings.

Ms. SLOAN. We have not been getting the cooperation we need.

Senator KASTEN. Clearly, there is a difference of opinion as to how important a downtown location may or may not be. Obviously, you disagree. Did you have one further comment?

Ms. STEORTS. Yes, Mr. Chairman.

Senator KASTEN. You looked as if you wanted to comment further.

Ms. STEORTS. I would just like to say that we will certainly put this on a high priority at the Commission. Anything you could do as chairman of this subcommittee will help.

I did make a recommendation to Gerry Carman at one point that they might consider two small agencies working together on some space. With the cutback in other agencies, there may be a possibility of going in with another agency and sharing some space. I think that is also a possibility. The downtown space, as you know, is very, very expensive.

Ms. SLOAN. Not any more, Nancy.

Ms. STEORTS. Yes, it is. As far as GSA is concerned, they are giving up buildings rather than buying new buildings or renting new buildings. So as they cut back, it is a serious concern of ours. Anything you can do to help us would be greatly appreciated.

Senator KASTEN. Thank you.

There are a number of other questions, some from other Senators who were unable to be here today, and a couple from me and our staff, which I would like to submit to you for the record, and ask that you reply or respond to those questions.

Ms. SLOAN. Could you indulge me for just a moment?

Senator KASTEN. Are you going to argue about downtown rents? I would not indulge you on that one.

Ms. SLOAN. No; Commissioner Zagoria had mentioned the amusement rides. When I leave here, I will go to the city council of the District of Columbia to testify on trying to keep the Office of Consumer Protection a separate entity. It is about to be molded into a huge conglomerate of business, rental, and consumer interests.

It has been my experience that many of the municipalities and States simply do not have the funds to keep their offices of consumer protection, their rental accommodation offices, and those things going independently. Therefore, they are combining them, and many of the things the local and State offices used to do they will not be able to do.

I know this is probably the case with amusement rides that Sam so eloquently spoke of. This will be a continuing problem. It is a jurisdictional question, but someone should be doing this. At this point, it is not being done, and it will not be, because the States and cities cannot do it.

Senator KASTEN. Thank you.

I would like to thank all of you for your testimony this morning. As I say, we will have questions coming back to you. Hopefully, you can get back to us.

I look forward to continuing to work with you in the cooperative atmosphere that we have been able to establish over the last year or two. Thank you all very, very much.

Ms. STEORTS. Thank you.

[The statements follow:]

#### STATEMENT OF HON. NANCY HARVEY STEORTS, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman and Members of the Subcommittee, it is a pleasure for the Consumer Product Safety Commission to appear before you today to discuss our reauthorization and some of our achievements since we met here two years ago. I might add that we are here today as the nationally perceived number one arm of government in matters of protecting the consumer. This was the clear result of an independent Harris poll which was industry-commissioned and announced last week showing that CPSC received a favorable rating of almost two-to-one among Americans. We are gratified that our efforts in safety are meeting with success and that they are well received around the country.

Since the Consumer Product Safety Commission appeared before this Subcommittee in 1981, much as been done by this agency toward the protection of the American consuming public, while carrying out our Congressional mandate.

#### DEVELOPING STANDARDS

Our primary function is the prevention of human suffering and deaths caused by unreasonable risks from consumer products. CPSC actions since 1981 have prevented untold thousands of deaths and injuries. A partial list of voluntary and mandatory standards developed since 1978 for which injury projections are now available indicates that these standards will prevent 450 deaths and 250,000 medically attended injuries each year when the standards have their full impact.

#### REDUCED RESOURCES

We have been able to move forward in our mission of safety since we last appeared here. Although we have done so with a reduced budget and a diminished staff, it has sometimes been difficult in the face of limited resources. Throughout this period, there has been a strong emphasis on cooperation, voluntary standards and the overall economic impact of our actions—all consistent with public safety as an integral part of responsible manufacturing practices.

In reviewing briefly for you some of the Commission's activities, I should like to mention a few of our accomplishments and, then, express a couple of requests for your consideration.

#### VOLUNTARY MEANS

Our policy and growing practice of achieving safety in consumer products, through voluntary means, is working well. Such a policy is providing results in the products we buy and, furthermore, is increasing cooperative acceptance among industries. As a result, the working relationship among manufacturers, consumers and this agency is at a high—and effective—level.

It is, we believe, one of our recent success stories of greatest impact, reflecting Congressional intent to protect the consumer from unreasonable risk of injury while guarding against the possibility of over-regulation. Furthermore, the results are achieved more quickly and with less cost.

Some examples of cooperative efforts to develop voluntary standards with CPSC involvement are those which affect the safety of ladders, bathtubs and showers, playpens, infant strollers, hot water heaters, extension cords, electric blankets, and quartz heaters.

Just since our reauthorization hearings two years ago, this agency has initiated 19 new voluntary standards development projects and is now involved in 38 such projects for this fiscal year.

#### MANDATORY OPTION

At this point, Mr. Chairman, I should point out that although the Consumer Product Safety Commission prefers and seeks cooperative solutions to product safety problems, it does not hesitate to put into place a mandatory standard when agreements are otherwise unreachable throughout a particular industry.

For example, the Commission has recently voted to propose a standard for toy chest lids to alleviate the risk of strangulations or serious injury to small children. The Commission has also decided to adopt a labeling rule in recent weeks for wood heating equipment when it was determined that a high percentage of fires involving these heaters had been caused by improper maintenance and installation. CPSC has developed 35 mandatory standards or bans in its 10-year history.

In the case of either voluntary or mandatory standards, however, there has been complete communication and study of the issue. We are an open agency and our meetings are available for attendance by the public and press.

#### PRODUCT RECALLS

Mr. Chairman, when a danger is posed by a defective product in the marketplace, or in consumers' hands, it is also the role of the Consumer Product Safety Commission to investigate and initiate corrective action to eliminate or reduce the hazard. It is a responsibility conveyed to us by our authorizing legislation. Through the decade of this Commission's history, 3,174 recall actions (generally with cooperation from industry) have removed many products which contained defects creating substantial risk of injury. Over 1,100 of these actions were taken under Section 15 of the CPSA which empowers the Commission to remove "substantial product hazards" from the marketplace. Perhaps one of the most successful examples of a recent recall of a product which violated a safety regulation was the voluntary action of McDonald's Corporation, working with CPSC, in calling back 10 million toys already distributed and halting the distribution of 20 million others. Their action was taken within 24 hours after being notified by the agency that the miniature toys posed a potential choking hazard for children under three years of age. There have been a number of other such success stories. Recalls of hazardous products are a quick and economical method of coping with a clear emergency.



## INFORMATION AND EDUCATION

In conducting our responsibilities for consumer product safety, CPSC also has—in addition to bans, recalls, labeling and standards—the overall tool of information and education. Since many injuries are not the result of product design or defect, it is essential that consumers know the proper usage and safeguards for the things they buy. In this regard, we have had considerable activity and success. Among our recent outreach programs are the smoke detector program with the aim of getting a smoke detector in every home in America, the national toy safety program during the Christmas holiday season with the Toy Manufacturers of America in an effort to get the “right toy for the right child at the right age,” the National Poison Prevention Week activities, and many more.

## TWO REQUESTS

Prior to our appearance here today, the Commission responded to the Subcommittee's inquiry concerning any changes we would wish to be made in our authorizing legislation. In our letter or reply to you, we listed two essential features that we view as desirable.

First, the Commission favors a five-year reauthorization with Congressional assurance of adequate budgeting and personnel levels. While we are always pleased to come to Congress, it is an intensive effort for an already reduced staff, as well as for the Commission, to prepare the complete review of our enabling legislation in alternate years. We feel that routine Congressional oversight should be sufficient to monitor the performance of CPSC. A lengthier reauthorization period would also make it highly desirable to have stated assurances of personnel and authorized budget floors. Although inflation is much less a problem in 1983 than it has been in recent years, it has not been eliminated and should be recognized in projected authorized budgets. Similarly, a realistic personnel floor should be recognized for the agency, particularly as responsibilities grow.

Second, the Commission favors an amendment to section 6(b) of the Consumer Product Safety Act governing public disclosure of product information. As that section of our enabling legislation is now framed, our ability to release, under the Freedom of Information Act, any product information identifying a manufacturer or private labeler is severely restricted and demands a heavy investment in agency resources.

## CONCLUSION

Mr. Chairman, I realize the constraints of time prohibit a detailed review of this or other issues in these opening remarks. However, we are submitting, for the record, several issues papers which set forth our views on the following:

**A. Accomplishments of CPSC.**—In measuring the progress of this agency, the most important accomplishment is the prevention of human suffering. The recall responsibility of CPSC for both regulated and substantial product hazards has resulted in the removal of nearly 8.4 million potentially hazardous units from the marketplace in the last two years. These actions, alone, have prevented countless injuries and deaths.

CPSC has also successfully carried out a number of programs designed to address the special risks of certain population groups. Since children and the elderly are frequently susceptible to the hazards of certain products, the Commission's activities in these fields have been particularly important. Standards for such items as protective packaging, cribs, and small parts in toys, for example, have prevented many incidents of substantial harm to young children. Similarly, a variety of regulatory tools are used to encourage and promote specific safety for the elderly. Other activities directed toward gas-fired heaters, electric blankets, upholstered furniture flammability, and numerous others will alleviate many thousands of needless product injuries each year.

**B. 1983 and 1984 Priorities.**—This Commission sets its priorities annually based on the frequency and severity of injuries, costs and benefits of proposed actions, and the unforeseen nature of risks. These priorities allow CPSC to concentrate its efforts on those areas of the most serious product hazards.

The ten priorities for fiscal year 1983 are as follows: chain saws, smoldering ignition of furniture and bedding, children's exposure to chemical hazards, heating equipment fires, smoke detectors, formaldehyde released from plywood and particle board, pharmacy/medical community awareness, indoor air problems from fuel-fired appliances, dual purpose closure analysis, and school laboratory chemicals.

The nine priorities for fiscal year 1984 include five which will continue from 1983. They are: chain saws, smoldering ignition of furniture and bedding, heating equipment fires, plywood and particle board emissions, and indoor air problems from fuel-fired appliances. New priorities for next year will include chlorocarbons, poison prevention packaging, juvenile sports equipment, and safety for older consumers.

*C. 1981 Amendments to our enabling legislation and implementation.*—During the 1981 reauthorization for CPSC there were several amendments to our authorizing Act. Principal among those amendments were those which substantially changed our rulemaking authority and procedures for public disclosure.

Since 1981, CPSC has been required to publish an advance notice of proposed rulemaking (ANPR) and take other steps before issuing a standard or ban under either the Consumer Product Safety Act, Flammable Fabrics Act, or the Federal Hazardous Substances Act. The Commission has begun three rulemaking proceedings under these provisions: (1) ANPR for chain saws (May 5, 1982—CPSA), (2) ANPR for toy chests (April 14, 1982—FHSA), and will soon vote on the actual text of a proposed rule, and (3) ANPR for amendment of Flammability Standard for Mattresses (and mattress pads) (June 10, 1982—FFA).

Appropriate actions have been taken by the Commission to implement all of the amendments of 1981.

*D. Public Disclosure Under 6(b) CPSA.*—When the 1981 amendments to our enabling legislation were adopted by Congress, additional requirements and restraints were placed on the Commission concerning the release of information from which the identity of a manufacturer or private labeler can be readily ascertained. The requirements of this section have imposed on CPSC a heavy administrative requirement which is unique among health and safety regulatory agencies of government. It is the Commission's belief that the amendment should be revised so that the public's access to health and safety information is not impeded and that the agency's limited resources not be drained in implementing its provisions. Even the most routine request about a product from the press and public must now await at least a 30-day comment period by the manufacturer before responses can be given by CPSC.

*E. Hazard Program Projects.*—The Commission's efforts aim at the elimination or reduction of unreasonable hazards in consumer goods. Our programs study fire and thermal burn dangers, electrical hazards, children's and recreational products, power equipment, household structural products, and emerging hazards. These hazard programs were determined by analysis of hazard data. Projects, priority and non-priority, within each program are undertaken in response to indicated dangers in the marketplace. For example, within the fire and thermal burn program, an fiscal year 1983 and 1984 priority project on gas heating equipment is a two-pronged endeavor. The Commission is working with voluntary standards groups to improve the safety of gas-fired heating systems and will be conducting outreach programs to increase consumer awareness of potential fire and toxicity hazards.

At the conclusion of the other opening remarks, I will be glad to respond to your questions.

Thank you.

[The following information was subsequently received for the record:]

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SEPARATE STATEMENT OF HON. NANCY HARVEY STEORTS, CHAIRMAN, CONSUMER  
PRODUCT SAFETY COMMISSION

Mr. Chairman, and members of the Committee, I am grateful for this opportunity to present my individual views on why the Consumer Product Safety Commission should be reauthorized.

COMMISSION REVIEW

First some background, when I assumed chairmanship of this Commission eighteen months ago, I was presented with a reduced budget and staff that required reorganization. Many observers believed that such cuts and any reorganization would destroy the agency. I believe that these skeptics have been proven wrong. In many ways the Commission is now stronger and more viable because of this reorganization. We have moved in new, increasingly successful and cost-effective ways to protect the American consumer.

The basis for this reorganization was a management philosophy that placed emphasis on working with industry, instead of against it; a preference for voluntary instead of mandatory regulations—though I will mandate if necessary—and a belief

that programs to educate and inform the consumer are necessary to carry out our safety mission.

I believe that this approach has resulted in real progress. Let me give you some examples.

#### WORKING WITH INDUSTRY

Our improved relations with industry constitute a major success. In September, the Upholstered Furniture Action Council briefed the Commission on the status of their voluntary standard to address the risk of injury from smoldering ignition associated with upholstered furniture. At that time, an industry briefing was a very unusual event for the Commission. Previously, only staff had briefed the Commission. Since September, industry and consumers have frequently addressed the Commission. We have heard from toy chest manufacturers, consumers and consumer groups, kerosene heater manufacturers, chemical manufacturers, certifying laboratories, and a variety of trade associations.

These meetings and briefings provide an opportunity for Commissioners to share information and concerns. Time and money are saved by understanding problems in time to devise solutions. In other words, industry, business and the consumer are involved in the decision-making process at the earliest possible stage. I believe that this achievement has already had important safety payoffs.

1. Chain saws have been significantly improved with some firms marketing chain saw safety.

2. Research into the safety of kerosene heaters and fuel is proceeding very quickly.

3. Meetings with representatives of the particleboard—and plywood—industries have already resulted in a reduced level of formaldehyde emission.

#### THE VOLUNTARY APPROACH

These successes indicate that many—perhaps most—industries take their product safety responsibilities seriously.

There are many more that should be highlighted for their voluntary programs. Here are but three:

The furniture industry, for its commitment to safety through the development of The Upholstered Furniture Action Council's program to reduce smoldering ignition of upholstered furniture.

The juvenile products industry, for the great steps forward it has taken to prevent strangulation of children by redesigning cribs and beds.

The electric blanket industry, for working closely with Underwriters Laboratories and Commission staff to correct a fire hazard.

These types of responsiveness show me that industry does care about the safety of the American Consumer and that industry does not always have to be forced to make safety commitments.

#### EDUCATION AND INFORMATION

I also believe that the Commission should protect the consumer through strong educational and information programs. This too has been achieved.

One program that has proven successful has been the reprinting of safety booklets. For example, Tappan, a chain saw importer, has borne the cost of distributing 500,000 of our safety guides. For another example, the National Association of Fire Chiefs, has reprinted and distributed 12,000 of our smoke detector booklets.

Another program has been educational safety seminars and instructional awareness projects. Tests given before and after our pharmacy/medical awareness seminars show that the pharmacists who attend increase their knowledge about child-resistant closure laws. Scores improve as much as 35 points.

#### REACTION FROM CONSUMERS

Evidently, the American consumer thinks we are successful. In the Harris Poll "Consumerism in the Eighties" the Consumer Product Safety Commission is the only Federal agency that received a clearly positive rating on protecting the consumer.

This survey also presented these three facts.

It showed that 62 percent of those surveyed felt that products are safer now than a decade ago;

That consumers believe that labeling and information about products have improved;



And that 85 percent approve of Government protection against products that are dangerous.

#### REAUTHORIZATION

However, the need for the Consumer Product Safety Commission is shown not just by the success stories of cooperative, voluntary, industry/consumer/Commission efforts and the appreciation of America's consumers.

The need for this agency to be reauthorized is also demonstrated by the fact that our work is not finished.

I intend to continue to encourage voluntary safety measures by talking directly with corporate executives; by having consumer complaints sent to manufacturers as soon as the Commission is aware of them; and by expeditiously holding special meetings so that potential problems can be aired in a forum of constructive cooperation.

I also believe that the Commission should continue to protect the consumer through strong information programs with the help of industry. Consumers need to be told how to install, use and maintain a wide range of products—power tools, heating equipment, electrical appliances, to name just a few.

Finally, we need to continue our cooperative research, to learn about possible carcinogenic risks and to find out about emerging hazards. As new products appear and as our knowledge increases, sometimes new hazards are discovered. Several years ago, use of coal- and wood-burning stoves was minimal, and so were injuries associated with their use. But the rise in the cost of energy has increased the use of these products and has resulted in a 150 percent increase in injuries associated with this product.

The Consumer Product Safety Commission is needed as a catalyst and we will continue to be needed.

Until we no longer have to mandate regulations and impose fines.

Until all manufacturers voluntarily anticipate childrens' vulnerability and, for example, put safety devices on toy chests without a federal requirement.

Until all manufacturers understand the consumers need for instructional information and, for example, see that coal- and wood-burning stoves are adequately labeled without a mandatory regulation.

Until all firms immediately report safety problems and take quick, effective steps to warn the public and recall products that present substantial product hazards.

Until the marketplace becomes self-policing.

#### CONCLUSION

The Consumer Product Safety has offered much needed protection to consumers during the 10 years of its existence. But the Commission's work is not yet finished. The formula for success has been created, now we must be given the lease on life to continue what has been started.

Thank you. Now I will be happy to respond to questions.

Attachment.

#### EDUCATION AND INFORMATION

The following success stories show that information and education can raise consumer awareness of hazards, improve consumer safe use practices, and prevent injuries:

1. **Poison Prevention**—In Rochester, NY, after a CPSC-funded community program in 1977-79, childhood poisonings were found to decline by 66 percent from the pre-program level. The Monroe County Health Department has continued to fund the program (with assistance from Blue Cross/Blue Shield) now that CPSC funds are exhausted.

2. **Smoke Detectors Save Lives**—Several reports demonstrate that CPSC messages about using smoke detectors help prevent fire deaths. One consumer bought a smoke detector, put it on the refrigerator, and was awakened by the detector when a fire started. Another consumer was alerted to a fire by a smoke detector installed after the consumer participated in a CPSC seminar at AT&T where the consumer worked.

3. **Alaska Fire Deaths Reduced**—After 1½ years of fire prevention information/education (in which CPSC materials were a major part), the State Fire Marshal's office reported that fire death rate in Alaska has been cut by 50 percent from the pre-program level.

4. "Stop! Drop! Roll!" Saves Life—After participating in a CPSC-sponsored fire safety program, a boy saved his own life by rolling on the ground to extinguish flames ignited after he used gasoline to clean his bicycle.

5. Recalled Products Returned—After a consumer attended a CPSC infant safety class, at which unsafe/recalled rattles were described, the consumer reported some possibly violative rattles. CPSC investigated and found that several of the rattles failed the test and, therefore, had to be recalled. After attending a product safety exhibit at a shopping mall, several consumers reported that they recognized recalled products in their homes and immediately took steps to return them to the retailers.

6. Information about toy chest hazards lead to requests for "safety hinges"—After CPSC publicized information about toy chest hazards, several Regional Offices received dozens of calls from consumers asking where they could buy "safety hinges" for their toy chests.

7. Community Information Programs Continue after CPSC Funding is Exhausted—CPSC funded several "expectant parent workshops" at hospitals and clinics, and many of these have continued after CPSC funding was exhausted. CPSC also has encouraged communities to emulate the "Baltimore Model" for smoke detector programs to help give away or cheaply sell thousands of smoke detectors. There are smoke detector programs in 123 states and communities, and 57 states and communities are planning similar programs. In 14 communities CPSC transit cards were mounted at no cost to CPSC. In the area of poison prevention, CPSC has conducted seminars for pharmacists in several states (including Alabama, Idaho, Minnesota, South Dakota, and Texas) where the State Boards of Pharmacy offer "continuing education credit" to pharmacists who participate in the seminars. These seminars have raised pharmacists' awareness of the need to comply with the Poison Prevention Packaging Act; greater compliance will lead to reductions of childhood poisoning because of the demonstrated effectiveness of child-resistant closures.

[The following information was subsequently received for the record:]

#### QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

##### *Question 1. How does the CPSC set its priorities?*

**Answer.** The Commission selects priority projects in accordance with its policy on establishing priorities for Commission action (16 CFR 1009.8). This policy states that the Commission will fulfill the purposes of the Consumer Product Safety Act by applying the following criteria:

(1) Frequency and severity of injuries: Available data from NEISS and supplementary data sources are used. Undercounting of injuries is considered as well as an evaluation of the seriousness of the injuries.

(2) Casualty of Injuries: Consideration is given to the amenability of the hazard to injury reduction through Commission action.

(3) Chronic illness and future injuries: Certain products, although not presently associated with large numbers of frequent or severe injuries, deserve priority attention if there is reason to believe that the products will in the future be associated with many such injuries and illnesses.

(4) Cost and benefit of CPSC action: Consideration is given on a preliminary basis to the prospective cost of Commission action to consumers and producers, and to the benefits expected to accrue to society from the resulting reduction of injuries. Commission costs are also considered. Assuming other factors to be equal, a higher priority will be assigned to those products which can be addressed using fewer Commission resources.

(5) Unforeseen nature of the risk: Consideration is given to the degree of consumer awareness both of the hazard and of its consequences. Other things being equal, priority may be given to unforeseeable risks from the ordinary use of a product.

(6) Vulnerability of the population at risk: Children, the elderly and the handicapped are often less able to judge or escape certain dangers in a consumer product or in the home environment. Because these consumers are more vulnerable to danger in products designed for their special use or frequently used by them, the Commission usually assigns a higher priority, other factors being equal, on preventing product-related injury to children, the handicapped, and senior citizens.

(7) Probability of exposure to hazard: The Commission also considers factors which can help to determine the likelihood that a consumer would be injured by a product thought to be hazardous. These factors are the number of units of the product that are being used by consumers, the frequency of such use and the likelihood that in

the course of typical use the consumer would be exposed to the identified risk of injury.

In addition to the specified criteria used by the Commission to select priority projects, other criteria and data may be taken into account as appropriate.

Selection as a priority project reflects the Commission's determination that a targeted problem area requires full funding to accomplish significant reductions in deaths and injuries. By full funding, the Commission means allocating sufficient resources to a project so that lack of resources do not hamper project completion. The need to focus agency efforts on a few major priority activities and the effort to fully fund priorities limits the number of projects which are identified as a priority each year.

**Question 2.** Is the CPSC developing standards for home stairways? Why do you believe that a stairway is a "consumer product?" Please explain the CPSC's investigation of portable telephones as an emerging hazard. How much money has the agency spent to date developing these standards?

**Answer.** The Commission is not developing standards for home stairways. However, the Commission does have a project on Architectural Safety Guidelines that includes plans to have model building codes incorporate guidelines developed by researchers for improving stairway safety.

Stairways would be "consumer products"—according to the Consumer Product Safety Act, its legislative history, and applicable case law—only if they are marketed to consumers in significant numbers as distinct articles of commerce. This depends on detailed marketing information that the staff has not yet collected and that need not be collected unless a rulemaking or enforcement activity were under consideration. For now, we believe that the Commission has authority to prepare safety recommendations for most products, including stairways, found in the home.

The investigation of portable telephones is in response to six consumer complaints. Consumers have complained about the sound level emitted by their portable telephones, when they ring, through the earpiece, or when an audible signal transmitted from the telephone's "base station" is emitted and the telephone is being held close to the ear. The complaints stem from concerns that loss of hearing has or could occur to someone who has the telephone next to his other ear at the time it rings or emits a signal from the base station.

In carrying out our investigation we have, from the first, been in contact with representatives of the industry. Our contact has been primarily channeled through the Electronic Industries Association's Telecommunications Group. It has provided valuable assistance to the Commission staff in gathering information on various types of portable telephones on the market and relevant voluntary standards for this type of product.

Our investigation is only in its preliminary stages at this point as the staff contacts consumers who complained about their telephones to obtain more detailed information. If this information leads the staff to conclude that positive, additional action is required, either in voluntary standards or mandatory standards development, all available information will be brought before the Commission for its consideration.

During fiscal year 1982 and 1983, the agency spent two staff years (\$60,000) on the project including stairways, but did not spend any contract dollars. So are in fiscal year 1983, the cost of the investigation of portable telephones has been one staff-month (\$3,000) and no contract dollars.

**Question 3.** The CPSC has convened a chronic hazards or "CHAP" panel on asbestos. Please explain the status of the "CHAP" panel. What has the panel accomplished to date?

**Answer.** The Chronic Hazard Advisory Panel (CHAP) was convened on January 23, 1983, to provide scientific advice to the Commission concerning the potential chronic hazard of cancer associated with the use of consumer products containing asbestos.

To date the Panel has:

- Identified a number of issues to be discussed;

- Created an outline for its report to the Commission;

- Assigned members of the Panel to draft specific chapters of the report;

- Shared outlines of these chapters among Panel members for peer review; and

- Commenced writing first drafts of the chapters.

These drafts are scheduled for Panel discussion in open session on March 17 and 18 at the CPSC offices in Bethesda. The report to the Commission is due by the end of May, and is expected to encompass scientific data and other relevant information relating to the potential risks from asbestos. The statute requires that this report must be considered by the Commission and incorporated into any advance notice of



proposed rulemaking and final rule addressing a chronic hazard presented by asbestos.

**Question 4.** A recent trend is the decreasing number of section 15 reports by the industry. How should the Commission encourage more reports?

**Answer.** The Commission is dismayed at the decreasing number of section 15(b) reports over the past few years. No single explanation accounts for this decline. Some of the reasons may include:

Some segments of industries regulated by CPSC which previously had problems may have "cleaned up their acts" through better testing and quality control and thus have fewer defects to report.

Some companies may have elected not to report because of a perceived "over-aggressiveness" on the part of the Commission staff in seeking recalls of hazardous products.

Finally, some companies may be operating under the mistaken believe that the changed political atmosphere, specifically, the Commission's announced policy of a more cooperative approach with industry, has relieved them of their statutory reporting obligations under section 15(b) of the CPSA.

We have taken a number of actions to reverse this trend. We are emphasizing investigations to identify hazards which have not been reported and are seeking civil penalties from companies which have failed to meet their statutory obligations so that companies which do report will not be placed at a competitive disadvantage. We have streamlined our procedures to give better and more expeditious handling to reports submitted by companies. We are also placing in priority order reports submitted by companies and making every effort to work cooperatively with companies to develop corrective action commensurate with the level and the type of hazard presented by the product that is the subject of a report. We have made extensive efforts to publicize the reporting requirements, to explain them to business leaders and to obtain feedback on how the agency can improve its section 15 program. Most notably, the Commission's Product Safety Conference held in December 1982 provided an excellent forum for the exchange of ideas on the reporting requirements.

**Question 5.** Is there a connection between the decrease in the agency budget and the decreasing number of section 15 reports?

**Answer.** As with any enforcement agency's activities, a reduction in its budget can be perceived by the regulated industry as a probable reduction in the level of its enforcement activities. Because firms are unlikely to state publicly that they have decided not to report possible substantial product hazards to the Commission today that they would have reported several years ago, it is difficult to document that diminished resources have been the reason for the precipitous decline in section 15 reports. However, we cannot help believing that companies, knowing that the agency has fewer investigative resources, have concluded that their chances of being detected with potentially hazardous products have lessened. Accordingly, many companies may have chosen not to report. It is clear that, concurrent with the drop in resources, the number of section 15 reports has also dropped.

**Question 6.** What percentage of the Commission budget is allocated to information disclosure? How much does the CPSC spend on information disclosure? What percentage of that amount is allocated to complying with section 6(b) of the CPSA?

**Answer.** The Commission in fiscal year 1982 spent approximately \$1.5 million of its \$32 million budget on information disclosure. This figure does not include the cost to develop fact sheets, press releases, public service announcements and the like. Approximately \$500,000 (or 33 percent) of the \$1.5 million spent on information disclosure involved costs to comply with section 6(b).

**Question 7.** What is the average number of man-hours necessary to comply with a non-6(b) request? How long, on the average, must the requester wait for a final response from the Commission? What is the average number of manhours necessary to comply with a 6(b) FOIA request? How long must the average 6(b) FOIA requester wait for a final response from the Commission?

**Answer.** After documents responsive to a FOIA request are collected, it takes an average of 2.3 staff hours to process a non-6(b) request. On the average, a requester must wait 6-10 weeks for a final response from the Commission for requests that do not involve section 6(b).

It takes an average of 31.7 hours to process a FOIA request subject to section 6(b). On the average, a requester seeking documents that involve section 6(b) must wait 30-40 weeks for a final response from the Commission. (This average waiting time does not include requests for documents pending since 1980 and 1981. There are approximately 450 such requests.)

The processing time set forth above (2.3 staff hours and 31.7 staff hours) involves only the processing time spent by the Freedom of Information Office and the Office of the General Counsel and does not include the time necessary to collect documents responsive to a FOIA request.

The time spent on processing documents involving section 6(b), coupled with staff reductions in the Freedom of Information Office and throughout the Commission, have caused the delay in processing requests under the FOIA. Between 1973 and June 1980, when the U.S. Supreme Court issued its decision in *CPSC v. GTE Syl- vania*, the Commission interpreted section 6(b) as not applying to FOIA requests. During that 7-year period, the Commission processed over 50,000 formal FOIA requests. Eighty to 85 percent of these requests were completed within 10 working days and the remainder usually within 30 working days.

**Question 8.** Explain fully the process by which the Commission analyzes and complies with a 6(b) FOIA request. Please give us an example of how the process works in terms of both a simple and a complex 6(b) FOIA request. Include the time requirements necessary in each case, plus an estimate of the per request cost to the agency.

**Answer.** When the Commission receives an FOIA request, it identifies, gathers, and duplicates the responsive documents. The directorate or office where the documents are located reviews each document to be sure it is responsive, to state any objections to release, and to highlight any potential problem (including section 6(b) concerns). The documents and any staff comments or objections to release are sent to the Freedom of Information Office for processing.

When the FOI Office receives them, it reviews the responsive documents to ascertain whether they contain information from which members of the public could readily identify a manufacturer or private labeler of a consumer product. If the information does identify such a firm, the FOI Office prepares the documents so they can be sent to each identifiable firm. If one document identifies several firms, each firm receives a copy of the document with all information concerning the other firms deleted. Depending on the number of identifiable firms, this process of deleting can be quite time-consuming. For example, it is not unusual for technical reports to identify hundreds of firms, each of which receives an individually tailored document to comment upon.

When the documents are ready and necessary deletions made, the FOI Office mails a copy of the documents responsive to the FOIA request to each identified firm for comment pursuant to section 6(b)(1). It provides the firm 15 days in which to submit its comments. This gives the Commission time to consider the comments before the end of 30 day period provided in section 6(b)(1).

A "simple" FOIA request might involve documents that identify only one manufacturer and only one or two types of documents, all relating to one product. As is often the case, documents responsive to the request may consist of product complaints submitted by consumers and in-dept investigation reports prepared by CPSC investigators.

Whether or not the identifiable firms submits comments, the Commission must take reasonable steps to assure that the information is accurate, that the disclosure is fair in the circumstances, and that the disclosure is reasonably related to effectuating the purposes of the statutes the Commission administers. To comply with these statutory requirements, the Commission has the following internal procedures: The FOI Office reviews the documents and the firm's comments (if any) and sends them to the Office of the General Counsel where an attorney reviews the entire file and prepares a memorandum to an Information Group, advising it whether the documents may be disclosed under section 6(b). The Information Group<sup>1</sup> reviews the firm's comments (if any), and the OGC attorney's memorandum and makes a determination regarding release, withholding, or revision of the documents.

If the firm has not objected to release of the information or has submitted no comments, the FOI Office carries out the instructions of the Information Group regarding release, withholding, or revision of the documents. The appropriate letters are prepared and sent.

If the firm has objected to release of the information because it claims that the information is inaccurate and the Information Group nonetheless determines that

<sup>1</sup> The Information Group consists of the Secretary of the Commission, the General Counsel of the Commission, and the Executive Director of the Commission, or their designees. The Commission has delegated to this Information Group the authority to make determinations, in accordance with Commission policy, regarding section 6(b) issues. If the Information Group chooses to do so, it can forward a specific section 6(b)-related issue to the Commission where the issue presents a complicated or new policy issue.

the documents should be disclosed, the FIO Office prepares a notification letter informing the firm of the decision and stating that the responsive documents will be released 10 working days from the date the firm receives the notification. This additional notice is required by section 6(b)(2) of the CPSA. Following receipt of the notice, the firm can use to enjoin release of the information. If such a suit is instituted, the delay in replying to the FOIA request depends on the lawsuit.

A "complex" section 6(b) request might involve responsive documents that identify several firms, several products or several different kinds of documents (for example, internal technical memoranda, technical reports from Commission contractors, and technical reports prepared by outside contractors). In this case, as discussed above, the FOI Office prepared a separate package for each identified manufacturer or private labeler. An additional complicating factor is presented when the identified firms, in commenting on the information, submit their own technical data to refute the Commission's data and therefore the conclusions based on that data.

As with the "simple" section 6(b)-related FOIA requests, the FOI Office reviews the documents and the firm's comments and forwards them to the Office of the General Counsel. There an attorney reviews the responsive documents and the firm's comments. If the firm challenges the accuracy of the information responsive to the FOIA request and presents specific data (e.g., a technical report or test data), the attorney consults with the knowledgeable technical staff in determining whether the Commission's technical analysis constituted reasonable steps to assure accuracy. Based on that consultation and the available data, the OGC attorney might recommend to the Information Group that the Commission appears to have taken reasonable steps to assure the accuracy of its conclusions and that fairness dictates disclosure of both the Commission's technical documents and the firm's technical documents so that the requester may make an independent judgment. However, where the conclusions stated in the Commission's technical documents do not identify the factual information on which they are based and the author is not available to identify that information, the Information Group may not be able to ascertain whether reasonable steps were taken and may, therefore, have to withhold the documents pursuant to section 6(b)(1). (Section 6(b)(1) requires the Commission, upon the firm's request, to release comments or other information that the firm has submitted to the Commission.)

As with the "simple" FOIA case, the OGC attorney makes a recommendation to the Information Group. That Group reviews the documents, the comments, and the memorandum and makes a determination about release, withholding, or revision. The FOI Office prepares the necessary letters. If required, the FOI Office notifies a firm that has objected to release on the basis of inaccuracy that the Commission intends to disclose the information.

On average it takes 31.7 staff hours for the Office of the General Counsel and Freedom of Information Office to process a FOIA request involving section 6(b). Obviously, the less complex 6(b) matters takes less time and the complex matters take more time.

**Question 9.** Identify the types of individuals or groups that made the most requests for information under the FOIA? (e.g., consumer, business, attorneys?) Do you have any knowledge or opinion about why these individuals or groups request information? (e.g., for litigation purposes, evaluation of competition, product safety)

**Answer.** Most requesters under FOIA are attorneys, representing individual consumers, consumers, researchers and consultants, manufacturers and insurance companies. Under FOIA, the Commission does not ask and requesters are not required to inform us of their reasons for making a request. Any member of the public has a right to request information from any government agency, including the CPSC. However, many do volunteer or explain their reasons for requesting the material. In other cases, we can determine their purposes or needs from the requests.

Attorneys, consumers, and insurance companies generally appear to be seeking information as a result of an injury associated with a particular product. Many appear to want the information to decide whether to file a lawsuit or to support an ongoing lawsuit.

Other requesters (e.g., attorneys representing trade associations, consumers, manufacturers) seek information generally on Commission activities pertaining to rule-making or other official proceedings regarding a particular industry. They apparently want the information to assist in presenting their position before the Commission or commenting on a Commission proceeding; or they may have a commercial interest in the outcome of a particular issue.

Many consumers that make requests apparently seek the information to learn if other consumers have made complaints or reported incidents concerning a particular product. They may do so to decide which brand of product to purchase. Other



consumers seek information about an incident involving themselves that may have been investigated by the Commission. Consumers also seek general information on an industry or product type.

Manufacturers usually request information regarding their own product or their own industry generally.

Other groups, such as media representatives, submit requests to learn about Commission activities in a particular area, presumably for a news story.

**Question 10.** Under the suggested amendments, wouldn't the Commission be able to circumvent the purpose of the 6(b) requirements by disclosing virtually any kind of information under the Freedom of Information Act? Why should the Commission be allowed to release this information under the Freedom of Information Act without complying with section 6(b)?

**Answer.** The Commission has requested that section 6(b) be amended. The preferred option is to exclude information that is released pursuant to a Freedom of Information Act request from the requirements of section 6(b)(1). A secondary option would be to amend section 6(b) to provide that when the Commission releases information under the Freedom of Information Act, soliciting a manufacturer's or private labeler's comments and then releasing those comments with the requested information satisfies the information disclosure requirements under our acts.

Neither of these suggested amendments would circumvent the purpose of section 6(b) because information which the Commission discloses at its own initiative would continue to be subject to all of the requirements of section 6(b). Additionally, the provisions of section 6(b)(5) restricting disclosure of information reported under section 15(b) would continue to apply to all releases including disclosure under the Freedom of Information Act.

There is a significant distinction between the Commission's disclosing information at its own initiative and in releasing information in response to a Freedom of Information Act request. When the Commission initiates the disclosure of information, it does so to influence public behavior with respect to particular consumer products. The Commission places its weight and official role behind the information and expects the public to rely on the dissemination, in large measure because the Commission has made it. Under such circumstances, the Commission vouches for the accuracy of the information. The public is entitled to expect that the Commission has a reasonable basis for its position and, by the same token, manufacturers and private labelers have a right to expect that information about their products is reasonably accurate and not unfairly disparaging. Section 6(b)(1) is intended to address these concerns and it has proven effective in doing this. Under the suggested amendments, information disclosure initiated by the Commission and thus which bears the Commission's imprimatur would continue to be subject to the current disclosure requirements.

Information disclosed in response to a request under the Freedom of Information Act presents a significantly different situation. The Commission does not initiate the disclosure nor give its imprimatur to the information. The Commission does not express an opinion regarding the meaning of the information or endorsing any particular point of view. The Commission does not vouch for the credibility of the information. Its role in responding to a Freedom of Information Act request is essentially passive.

Until the Supreme Court's decision in *CPSC v. GTE Sylvania*, 447 U.S. 102 (1980) the Commission did not interpret 6(b) as applying to information released under the Freedom of Information Act. During the 7 years between 1973 and 1980 the Commission provided documents to at least 50,000 Freedom of Information Act requestors. Many of these documents contained product specific information. Although thousands of documents were released during these years, the Commission is unaware of any adverse effect on a manufacturer or private labeler that would justify adherence to the 6(b) requirements.

Finally, the very purpose of the Freedom of Information Act, namely open and accessible government is seriously jeopardized by the imposition of the 6(b) requirements to information released under the Freedom of Information Act. The FOIA is not limited by any requirement that the releasing agency take any steps to assure that the information is accurate, or the disclosure fair. No other health and safety agency is circumscribed by disclosure requirements similar to those in section 6(b) when responding to a FOIA request. There is no rationale for requiring the Commission alone among the health and safety agencies to adhere to these restrictions particularly in light of the seven year experience prior to the GTE case, and because the information it releases is no different then that disclosed by other agencies.

**Question 11.** It is stated in the proposed regulation that consumer confirmation of product complaints is a reasonable step to assure accuracy. Why is this a reasonable step?

**Answer.** Any discussion of the consumer confirmation process must begin with a caveat. Consumer confirmation of a product complaint is not the sole step to assure accuracy of the information and the complaint. It is simply one of several. Thus, even after a confirmation is obtained, the Commission will independently evaluate the information to determine whether either a manufacturer's comments or anything on the face of the complaint itself calls into question the accuracy of the information, or whether the consumer is qualified to make the observations contained in the complaint. Thus, for example, if a consumer makes a statement about a defective part in an electric motor, and nothing in the complaint indicates that the consumer has the qualifications and training necessary to make that observation, the Commission would not disclose that statement. Similarly, if a complainant lacks first hand knowledge of the information contained in the complaint, the complaint will not be disclosed. We would also note that manufacturers are now receiving complaints from the Commission shortly after the Commission receives them. Thus, manufacturers are in the position to contact the complainant and to conduct their own investigation or analysis of the complaint. This early notification gives manufacturers a timely opportunity to collect specific information which will enable the Commission to evaluate issues of accuracy, should the complaints be the subject of a subsequent information request.

To understand consumer confirmation, one must understand what consumer complaints are and are not. The great majority of consumer complaints are reports of the incidents or experiences that consumers have encountered with specific products. Very few of the complaints go beyond this and attempt to attribute an incident to a specific cause or a defect in a product. Thus to the extent a complaint describes an incident, it is nothing more than what it purports to be—a description by the consumer of an experience or problem he or she observes. The fact that it says nothing about the presence or absence of a defect in the product, neither contributes nor detracts from the complaint. Further, the fact that a complaint is not supported by an in-depth investigation or scientific analysis does not create an inference that the observations of the consumer are inaccurate *per se*.

The confirmation process recognizes that a consumer who experiences an incident or observes a problem is the one most qualified (and often the only qualified) to accurately describe what he or she encountered. No one would question, for example, that a consumer is qualified to testify to his or her experiences in court. The reliability of the information contained in consumer complaints is confirmed by the Commission's experience in conducting in-depth investigations and in collecting affidavit evidence during litigation. Many of the Commissions in-depth investigations are conducted as a response to consumer complaints. Almost always the in-depth investigation shows that the information originally provided by the consumer is accurate. Similarly, during the course of litigation, the Commission often follows up complaints to collect evidence in support of a case. Almost always, the information contained in the original complaint is found to be accurate. The confirmation process adds an additional safeguard of accuracy by permitting the consumer a second opportunity to review and correct or add to the information in the complaint. Further, the confirmation process provides an assurance that the complainant will carefully review the information by requiring the complainant to acknowledge that the information is true and accurate to the best of his or her knowledge or belief. There is little more that one could obtain if the Commission were to go so far as to take the complainant's affidavit.

On occasion, complaints identify the causes of incidents or potential defects in products. As stated earlier, the Commission routinely reviews such claims to determine whether the complainant possesses the expertise to make the observation or whether the complainant is reporting the observation of a person with the requisite training and experience to draw the conclusion. If the complainant is not qualified and/or the person who provides the information to the complainant is not qualified, the Commission does not release the information.

**Question 12.** Why did the agency take nearly 2 years to propose 6(b) regulations?

**Answer.** From its early days the Commission has had a clearance procedure by which information released to the public (other than that released in response to FOIA) was checked for accuracy and completeness. Until the Supreme Court decision in *Consumer Product Safety Commission v. GTE Sylvania, Inc.* 447 U.S. 102 (1980), the Commission did not apply section 6(b) to Freedom of Information Act requests. Therefore, the internal clearance procedures were adequate. In addition, section 6(b) is a self-effectuating statute that requires no regulation for its implementa-

tion. As a consequence, the Commission did not devote resources to issuing an interpretive regulation.

In June 1980, immediately following the *GTE Sylvania* decision, the Commission analyzed section 6(b)'s application to FOIA requests in light of the court's decision to determine its impact on Commission operations. This was a lengthy process. During this period the Commission acquired experience in the across-the-board application of section 6(b) mandated by the Supreme Court. Based on this experience, the Commission staff drafted several possible section 6(b) regulations, and the Commission met on several occasions to discuss the impact of section 6(b). The Commission was ready to issue a proposed section 6(b) interpretive rule in mid-1981 when we learned that section 6(b) would probably be amended during the Commission's reauthorization process in 1981. The Commission decided to await the outcome of the legislative process.

In August 1981 section 6(b) of the CPSA was extensively amended. New provisions were added and existing language amended. The Commission needed time to assess the impact of the amendments on the Commission's operation, to analyze the statute and its legislative history, and to develop policies and procedures consistent with the amendments. The Commission discussed section 6(b) and its implications on numerous occasions. The staff drafted several versions of a proposed interpretive rule. Each version was discussed with the Commission and the Commission staff met with representatives of industry and consumer organizations to solicit their views. At the conclusion of this involved process, the Commission issued a proposed regulation for notice and comment on November 5, 1982. The proposed regulation is the culmination of this process of analysis and study and represents the Commission's exhaustive analysis of section 6(b).

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U.S. CONSUMER PRODUCT SAFETY COMMISSION,  
Washington, D.C.

Hon. BOB KASTEN,

*Chairman, Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your inquiry. There are two areas of critical concern to the Commission as it approaches its reauthorization.

First, the Commission strongly believes that it must be reauthorized for a five-year period and be given the assurance that it will receive adequate resources during this time. Second, the Commission is convinced that section 6(b) of the Consumer Product Safety Act, which governs disclosures of information from which the identity of a manufacturer or private labeler can be readily ascertained, must be amended so that it is less restrictive and less resource intensive.

Reauthorization for a five-year period, together with a Congressional expression of support for a minimum budget and personnel floor, are essential to the continued effectiveness of the Commission's programs.

It is also the Commission's strong belief that section 6(b) of the CPSA must be amended so that it does not unduly restrict the public's access to health and safety information and drain the Commission's limited resources. There are two ways in which we believe this can be accomplished that will also safeguard the rights of manufacturers and private labelers.

The first option would provide that section 6(b) of the CPSA only applies to affirmative disclosures of information by the Commission and not to those instances where the Commission is merely responding to a Freedom of Information Act (FOIA) request. We are the only federal agency that has this type of statutory provision restricting the manner in which FOIA request are processed.

As you know, the Commission has stringent internal review procedures governing its affirmative release of information. These internal review procedures in conjunction with the 6(b) requirements provide more than adequate safeguards to manufacturers and private labelers, and ensure that a mechanism for effective retraction exists should the Commission find it has disclosed inaccurate information. We, therefore, believe that amending section 6(b) to provide that its requirements do not apply to FOIA requests but only to affirmative disclosures of information would be consistent with Congressional intent.

If the 6(b) requirements continue to apply to FOIA requests, the Commission believes that a second option would be to amend the statute to provide that soliciting comments from the manufacturer and then disclosing the firm's comment with the requested information is a reasonable step to assure accuracy and to assure that the disclosure is fair in the circumstances. Amendment of the statute along these lines ensures that the requestor has the information necessary to evaluate the credibility



of the material without making the Commission a guarantor of accuracy. This procedure would allow the Commission to expeditiously respond to FOIA requests, conserve limited resources and, we believe, be consistent with the intent of the statute.

Once the Commission's reauthorization process commences, there will be a number of important issues that the Committee will consider. In our view, a five-year reauthorization and the amendment of section 6(b) are our two most critical priorities. I appreciate this opportunity to communicate these priorities to you, and would be glad to answer any questions you may have.

Sincerely,

NANCY HARVEY STEORTS, Chairman.

#### QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

*Question.* Recent press allegations have dealt with your use of an agency car for personal benefit. Please comment on your use of government vehicles.

*Answer.* Since questions were raised recently in a press account about appropriate vehicle uses at CPSC, I have undertaken a review of the policy and practices for such usage throughout the agency to ensure compliance with general standards for government vehicles. In my own use of a government vehicle, it has been restricted to those trips which were associated with my official duties, including those of nearly a year ago which were mentioned in the press account. Moreover, I have given up the car that had been available to me as Chairman for official use, lest questions about it may overshadow the important work of CPSC. I announced the decision to the other Commissioners on February 11, and administrative procedures are in progress, necessary to sell the car which is owned by CPSC.

This agency also owns another car which is for the official use of the other Commissioners. Both this car and the one previously available to me as Chairman have been periodically used for official messenger service to and from other federal agencies and Capitol Hill.

There are also two passenger vans leased by this agency. One is used for regular shuttle runs between our Commission offices at 1111—18th Street, NW, and our staff offices at 5401 Westbard Avenue, Bethesda, Maryland, a distance of about five miles. The second van is used for regular runs to our laboratories at Gaithersburg, Maryland, and at 200 C Street, S.W., in Washington. It is also used as a backup for the other van in case of mechanical difficulties or when there are heavy passenger loads.

Additionally, CPSC leases 54 automobiles for the official use of field investigators, in our 32 field offices around the country.

In all cases, CPSC vehicles in Washington and at our field offices have been provided for official use. It is believed that these vehicles have been operated within the general guidelines of official use for all government agencies. In order to keep a closer check on the use of all vehicles in this agency, a system of detailed trip logs has been put into effect.

*Question.* After 18 months at the agency, do you believe it should be 1) headed by single Administrator 2) moved into the Executive branch; if yes, where?

*Answer.* I am satisfied with the present Commission form and recommend no change.

#### STATEMENT OF SAM ZAGORIA, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

I appreciate the opportunity to submit a few comments about reauthorization of the Consumer Product Safety Commission. Despite many handicaps, such as a severely reduced staff, closing of several regional offices and a slash in operating funds, I believe the record of the past two years will show that the Commission has faithfully carried forward its responsibility to consumers with due regard for the impact on manufacturers, retailers and possible added costs to consumers. We have done so in public sessions, free of any taint of special treatment.

In the next reauthorization, I hope we can be given a period of sufficient years, and assurance of adequate funding and staffing so that we can plan with confidence and give the skilled and committed CPSC Personnel a real feeling that CPSC is here to stay. It is difficult to deal with complex and relatively unknown issues without the cumulative knowledge and experience of our scientific and technical people. Yet, according to an analysis by the General Accounting Office, we have lost 32 percent of all our scientific and technical personnel in the past two years.

These specialists can save lives and avert injuries for consumers; their work can avert multi-million-dollar product liability suits for manufacturers. Preventing tragedies is a lot cheaper—for government and industry—than paying for them after the fact.

A second improvement I would seek in the new reauthorization is at least modification of the 6(b) provision. This provision limiting the release of information received by the Commission has practically closed down sharing of consumer complaint information with members of the public. The limitation goes further. For example, without prior express agreement from a manufacturer, we generally cannot respond to an inquiry about how a recall is going or share a news clipping about a recent infant death in a product on recall.

If a news reporter inquires about problems with an appliance, before we can mention any incident in which the brand name of a manufacturer is identified, we must notify the company and get comments from it in a process that consumes 30 days or more. In most cases it is likely that the incident will be known to the firm already since it is standard CPSC procedure to forward consumer complaints where a manufacturer is identified or is identifiable. If the reporter is willing to wait a month or more to write his story—and few of them are—the information could become available. (I assume a good reporter would want to contact the company, even without the CPSC intervention, but we are not permitted even to tell the reporter which firm to dial.)

Some business spokesmen have been concerned about consumers making mistakes in reporting safety complaints to the CPSC and I understand this. A suggestion has been made to alleviate the concern: Use of a carefully crafted disclaimer on released material indicating the incident has not been investigated by the CPSC.

But some trade groups want more. They argue that in order to comply with the requirement that the Commission take "reasonable steps" to assure that consumer information is accurate before release that an in-depth field or technical investigation be made of each complaint. Since field investigations cost about \$450 each and since one product may involve a dozen or a hundred consumer complaints, it is clear that such a requirement would be more than troubling. It would be so costly we could not afford it. As it is, we are averaging about 120 to 240 requests involving 6(b) processing every month and have a backlog of about 2,000 requests awaiting response. Only a trickle emerge each year.

It is difficult to square this situation with the Congressional directive, now 10 years old, for the Commission to "maintain an Injury Information Clearing-house to collect, investigate, analyze, and disseminate injury data and information, relating to the causes and prevention of death, injury, and illness associated with consumer products."

A third subject that I hope you would consider is Commission jurisdiction over amusement rides. Our staff estimates that 14,000 persons were injured on amusement rides in calendar year 1981—an increase from an estimated 10,000 in 1980. From 1973 through 1981 there have been 55 deaths involving amusement rides.

In our last reauthorization, Congress removed jurisdiction over fixed-site amusement from CPSC. The arguments had been made that amusement parks were sufficiently regulated by local authorities and already maintained a high standard of maintenance, training and insurance. The unfortunate facts are that only 21 of the 50 states have any amusement ride regulation and fixed sites are not covered in all of the 21. Serious accidents have been recorded at several parks and presently we have no authority to even investigate them. Let me cite a few, all from last summer:

In Ocean City, Md., an operator was killed when a "Super Loops" ride ensnared him and flung him to the ground. In Redwood City, Calif., two persons were seriously injured on a "Birdie Glide" ride. In Vernon, N.J., a young man was electrocuted on a "White Water Kayak" ride. In Orlando, Fla., a youth drowned going down a 60-foot water slide into a 5-foot depth. All these incidents were at fixed sites, and unless Congress revises our authorization, if similar incidents occur this summer we can't investigate or regulate.

The problems of last summer were not unique. In earlier years the Commission acted in major accidents in Six Flags Over Mid America in St. Louis, Mo., the State Fair of Texas in Dallas, the Great America Park in Santa Clara, Calif., for example. Neither Missouri nor Texas had any legislation dealing with amusement rides and the California law related to mobile rides only. Additionally, it should be noted, rides identical to those involved in the accidents, are frequently used in other states, obviously beyond the reach of any individual state regulation.

The Commission continues regulation of mobile rides, providing a clearing house for information on ride incidents and moving to correct known safety defects. In this the Commission makes use of its trained investigators, its technical staff in me-

chanical, electrical and structural engineering, as well as outside expertise from the National Bureau of Standards, state and local governments and universities, when necessary.

Because of the way the Commission has proceeded in this field, return of the jurisdiction over fixed sites will not mean an additional paperwork burden for industry, but it will mean that the no-man's gap in amusement ride regulation will be closed. Consumers will have more assurance that rides give youngsters the thrill they seek without the risk of death or serious injury. As things now stand, even as operators seek to lure customers by emphasizing the risk and danger of rides, there may be no governmental unit even to investigate in case of tragedy and alert other operators, as well as the public, of the hazard.

Amusement rides—fixed and mobile—are a big business, carrying an estimated billion riders a year. They deserve the protection of government, too.

I have tried to keep my requests few in number and modest in nature. If I can help by providing any further information, I would be delighted to do so.

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STATEMENT OF EDITH BARKSDALE SLOAN, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Good morning.

In the interest of time and because I am confident that all points at issue in the Commission's request for reauthorization will be touched on here today at least twice, I will keep my remarks brief.

To begin, I have been troubled by Section 6b of the Consumer Product Safety Act since I was appointed to the Commission five years ago. When the section was amended in 1981 to impose tighter restrictions on the Commission's ability to release information to the public I was distressed. It seems to me that a section that inhibits the release of information that would accrue to the safety of the consumer is in direct contradiction to the spirit and intent of the statute.

Later today the sub-committee will hear a distinguished panel discuss 6b. Regarding release of information under the Freedom of Information Act, the CPSC general counsel will tell you that "any potential for harm must be balanced against the public's right to access to documents in the Commission's possession." I am in total agreement.

I have another concern in the matter of 6b. Specifically, I believe that there are first amendment considerations here which have not really been publicly examined. The 6b panelists could do worse than give some time to the question. I would much prefer to see it discussed in this forum today than tested in court tomorrow.

In the five years I have been a member of the Commission, I have participated in three rounds of reauthorization hearings. I appreciate the need for periodic assessment of the performance of any government agency or department. However, speaking as the senior Commissioner (from point of service, I hasten to add) I can tell you that short-term authorizations, for one or two or even three years, amount to a kind of Sword of Damocles. They do nothing for the staff's morale, encroach substantially on the time of the Commissioners and devour resources.

The present two year authorization actually is a shorter time than it takes on the average to promulgate a standard or a rule. Industry is not unaware of this and in those instances where it is inclined to foot drag, the short statutory life of the Commission provides incentive to do just that. A brief authorization is, in my experience, seriously counter productive to the commission's ability to discharge its congressional mandate.

Since in all probability this will be my last appearance at a CPSC Senate reauthorization hearing, I ask the indulgence of the committee as I make an observation or two which may help in your current or future discussions.

First, I respectfully suggest that this committee can derive a certain satisfaction from the Harris public opinion poll released last week. It ranked the Consumer Product Safety Commission, your creation, in part, and certainly one of your responsibilities, first among all government agencies involved in consumer protection. I know that I found a measure of personal gratification in learning from the poll that those days of frustration and nights of despair were not all in vain; that a significant number of American consumers are aware of the CPSC and hold a positive view. There is in the poll much food for thought.

I found in those tables numbers which bolstered my conviction that consumer product safety has only begun to be a force worthy of notice. For example, private industry efforts in protecting the interest of consumers were perceived negatively by 57 percent of the people polled. I don't believe that kind of reaction comes from



inborn mistrust. I think it is the result of life experience. Those figures tell me that the CPSC must be made stronger, must be allowed to demonstrate that it is not a paper tiger, and that the Congress did not pass this legislation in a moment of whimsy but because it found that "an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce."

Finally, I would like to submit for your consideration two observations of the poll-takers. They found: "The overall picture of Black consumers that emerges from these figures is one of a group that seems particularly vulnerable to and concerned about consumer problems, and that is an ally of those who press for more government regulation."

They also found: (The) "groups most likely to perceive deterioration (in the consumer's world) include women, persons aged 50 and over, Blacks, and individuals with incomes of \$15,000 a year or less."

For me these observations tell less of how the marketplace is viewed by minority and low income consumers than how minority and low income consumers are viewed as a market.

During my tenure on the Commission I have tried to give special attention to those consumers who by circumstance are more vulnerable to risk than the population as a whole. As the Commission's resources have dwindled, so too have the means to reach out to special population groups. As long as that condition prevails a large segment of American consumers will be unfairly victimized by a benign discrimination.

I give you that thought to carry into your future deliberations.  
Thank you.

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#### STATEMENT OF STUART M. STATLER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman, I appreciate the opportunity to offer a few additional observations concerning the Commission's Reauthorization. I want to emphasize the need for an extended reauthorization period. I also want to highlight the urgency for reform of the Section 6(b) disclosure provisions which unduly restrict us from alerting the public to emerging safety concerns.

#### EXTENDED TENURE

Concerning reauthorization, consider for a moment what would happen if there were no Consumer Product Safety Commission—

Who would monitor crib standards that prevent 50 infants each year from suffocating?

Who would enforce safety packaging requirements for drugs and toxic household products preventing 12,000 poisonings and 40 deaths annually to children?

Where would efforts be taken to deal with thousands of cancer deaths from exposure to vinyl chloride, benzene, benzidine dyes, TRIS, and asbestos in consumer products?

Who would be pressuring the makers of kerosene heaters to reduce toxic contaminant emissions or to provide better shielding to reduce the 600 serious burn injuries yearly to youngsters?

Who would be around to push for continued progress in the promising effort to reduce the thousands of gruesome injuries from chain saws kicking back into the user?

Where would the impetus be for truly effective voluntary safety standards by industry, instead of a lowest-common denominator result or no attention at all?

Yet each time the Commission has faced reauthorization it's like preparing to do battle. Threats of elimination or wholesale shifting of the agency elsewhere invariably arise. Repeatedly, we've had to re-establish our very basis for existing. This is quite different from almost any other government agency, executive branch or independent. Even though its legislation must be renewed annually, no one doubts that the Department of Justice will continue. Nor is the survival of FDA, EPA, NHTSA, OSHA, or the NRC ever in question.

But during each reauthorization, CPSC efforts inevitably are diverted from pressing safety concerns because of the threat to our very existence. A great deal of staff time and expertise must address anew what the agency has been doing and why it should continue. Responding to these questions in not only expected but appropriate as the CPSC prides itself on being fully responsive both to Congress and the public. However, repeatedly raising the question whether there should be a CPSC drains our resources. And by so doing, it limits our effectiveness.

The sheer volume of material produced is hard evidence of the prodigious effort expended to detail the agency's record. For each reauthorization, several hundred pages are developed to answer House and Senate Committee inquiries. Reams of testimony and supplemental responses are readied. Meetings between Hill and agency staff and follow-up responses consume days on end. Extended skull sessions amongst Commissioners and staff to coordinate our endeavors continue for months.

All this is time away from progress on safety concerns, even priority items like chain saws, kerosene heaters, and formaldehyde emissions. As a Commissioner, I'm extremely frustrated to see too-closely spaced reauthorization struggles tending to slow our safety agenda.

And the effect on staff is worse. There reauthorization generates anxiety and turmoil. Rumors of impending difficulty spread. Staff morale plummets whenever the agency twists slowly in the wind. We lose good people, and often cannot attract suitable replacements. Staffers see efforts planned to resolve safety concerns side-tracked for months on end.

The uncertainty has been exacerbated by the mammoth budget and personnel cuts of the last two years. The CPSC lost 32.1 percent of scientific and technical personnel since 1981, as compared to EPA's 1.4 percent loss and FDA's 0.5 percent gain, according to a recent GAO report. Few of our lost personnel were directly RIFed; many, beset by the constant barrage, simply believed they saw the handwriting on the wall.

An extended reauthorization period of perhaps five years would go far in redressing this problem. It would give the agency an adequate period in which to dedicate resource directly to resolving critical product risks. It would imply a Congressional imprimatur—far stronger than ever before—signalling "We're behind this agency and expect that its important mandate will be fulfilled." Congress would obviously retain tight control over the agency through periodic oversight hearings, on policy matters as well as on any specific hazard or topic.

#### PUBLIC DISCLOSURE OF INFORMATION

Now, to the disclosure issue. Industry clamor about CPSC's release of information hints of renewed efforts to gag the Commission. This would further subvert the intent of Section 6(b). That section's safeguards were designed to protect firms from misleading or inaccurate publicity coming from the agency. They were not intended to muzzle the release of critical safety information.

Certainly, information disclosure by a government agency carries clout and should be handled responsibly. No one is arguing that the Commission should be able to release information willy-nilly. Whimsy has never controlled CPSC's actions in informing the public about product risks. For the first seven years, the agency applied a pragmatic rule of reason. Publications, press releases, and the like contain information based on official agency findings. These affirmative disclosures carry the Commission's imprimatur. Accordingly, we thoroughly checked this information for accuracy and fairness before release, and met all other 6(b) safeguards.

But subsequent judicial and legislative action has landed us in a morass of procedures. We now have an incredibly cumbersome and costly maze of new disclosure requirements. For FY 1982 alone, about \$1.5 million—some 40 plus staff years—was consumed by processing information requests. Nearly a third of this amount (\$485,000) was used to satisfy 6(b).

These information inquiries run a wide gamut. Requests come in for agency briefing packages, Federal Register notices, advisory opinions, technical reports, meeting logs, advisory committee transcripts, consumer complaints, in-depth investigations, records of agency actions, and copies of requests under the FOIA, to name a few. On average, astoundingly, 32 staff hours in our Secretary and General Counsel offices are required to answer each FOIA requests that contains 6(b) information. This stands in stark contrast to the 2.3 hours needed per routine (non-6(b)) inquiry. And, the numbers don't even include the time of other directorates on 6(b) chores.

These costs sap our sparse resources. But expense is not the only reason we seek amendment of 6(b). More importantly, it is the attendant delay, which often has the added effect of stifling our ability to timely warn consumers about product risks.

Usually FOIA requests are handled on a first-in, first-answered basis. When a 6(b) problem undermines turnaround time, subsequent requests (perhaps non-6(b) related) are held up. Delay then mounts geometrically. A FOIA request may be seeking a document which lists 50 manufacturers. This document must first be purged, and then 50 copies made and readied for mailing to each of the named firms. No company can receive a document, soliciting that firm's 6(b) comments, which lists any other company name. Meanwhile, other FOIA requests are held up while the stack

grows higher with each day's mail. Paper multiplies. Documents, copies of documents, and manufacturers' comments cram desks and offices. Piles upon piles have outgrown available file cabinets. Right now, we are laden with enough 6(b)-related paper to easily fill the seats at Madison Square Garden.

The delay is overwhelming. Consider that pre-GTE,<sup>1</sup> from 1973 to 1980, some 50,000 formal FOIA requests were handled by the Commission. Eighty-five percent of these inquiries were answered within the ten working days set by the FOIA. The remaining 15 percent were answered within 30 working days.

In today's post-GTE backlog, as of January 1, 1983, over 3,000 FOIA requests were unanswered. Only an estimated 25 percent of FOIA requests are now answered within 10 days. These are the easy ones, often involving non-6(b) matters or previously 6(b)-cleansed documents. The remaining 75 percent take one to six months before collection of responsive documents can even begin. 6(b) complications drag out many inquiries—some interminably. Currently, 450 troublesome 6(b) FOIA requests dating back to 1980 and 1981 are still pending resolution.

There are no shortcuts to proper 6(b) handling of a document listing 400 companies possibly involved in violation of an agency standard; no timesavers in processing an 800-page section 15 file, supplemented by a 50-page company response objecting to FOIA release.

These delays do not mean only a frustrated FOIA requestor who may have to wait months or years. The requestor is often a reporter who wants to inform the public to a situation or hazard. So while the reporter waits, consumers are in the dark about risks to their well-being.

6(b) has yet another negative impact. Because firms have the right to sue the Commission to enjoin disclosure (as a result of the '81 amendments), they can effectively delay our notification to the public of a problem. As a result, our staff often must yield to a firm even on the wording of our own press releases to avoid further, possibly life-threatening, delays that may result from a lawsuit. Such compromises too frequently lead to weakened safety warnings, which may be lost on the media and the public. More than 200,000 potentially defective gas valves, used in liquid propane heating devices, were recalled after explosions caused at least five deaths and 21 serious injuries. Yet, our release couldn't warn about a related concern which may yet prove serious. Instead, we could only allude to our continuing investigation of 2.5 million other valves, identical to the recalled propane units, used in furnaces fueled by natural gas.

And too, a recent lawsuit, following extensive negotiation, delayed issuance of a press release by five days and would have delayed it much longer had a judge not acted expeditiously. Here, we sought voluntary corrective action from a manufacturer of hand-held squeeze toys virtually identical to ones involved where two infants choked to death. The firm objected to the press release and sued. A federal district court upheld our authority to issue the release. But, had we not obtained evidence of this lethal hazard independently of the firm's 15(b) report, 6(b) strictures could have kept the information from the public.

CPSC is the only health or safety federal agency which must undergo these egregious delays before disclosing vital safety information. We are the only such agency which is so hampered in alerting the public to potential hazards. If similarly bound, NHTSA could not timely notify car owners about defective tires and brakes; the Department of Agriculture would be precluded from promptly warning about tainted meat and dairy products. Currently, the Food and Drug Administration publishes a weekly enforcement report which is available to the public. It lists summary information concerning FDA recalls. Not so at the CPSC. We are muzzled in this respect.

I beseech this Committee to redress the terrible imbalance in our statute which gives greater emphasis to a company's concern about unfair or misleading information than to the public's right to know about serious product risks. I join with my colleagues in suggesting ways in which the rights of firms may be protected without unduly restricting access to health and safety information which the public should have.

Resumption of pre-GTE disclosure practices would dramatically cut delays. CPSC should not be the only federal health and safety agency with 6(b) restricting the flow of vital information.

However, if you choose to have 6(b) continue to apply to this agency, then set forth new conditions. Simply require that all comments from companies concerning an FOIA-requested document be sent with the item sought. The Commission would not serve as a guarantor of the information and could indicate this prominently on

<sup>1</sup> Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 192 (1980).



all documents. The requestor would have the means, based on information from the named firms themselves, to evaluate the credibility of any material at issue.

Neither of these alternatives is sufficient to address all of the problems associated with 6(b). Additional reform is also needed.

First, 6(b) safeguards were intended to protect firms from unmerited, adverse publicity coming from the Commission. Yet, today the agency or an individual Commissioner can't even congratulate a company in public for its cooperation or for a well-run recall campaign without first jumping through 6(b) hoops. The inapplicability of 6(b) to release of other than adverse information should be clarified. Positive or neutral reference to a firm or its product probably was never meant to be covered. But currently, even, to list X company as one of 20 manufacturers of lawnmowers involves submitting the list ahead of time, pursuant to 6(b) for the company's comments as to accuracy and fairness. A futile exercise indeed!

Second, because of 6(b), Commissioners are restricted from making known their dissent from an agency decision involving a negotiated corrective action plan or any other such matter that is not a formal "proceeding" in its most technical sense. If a Commissioner feels strongly that a vote to accept a proposed recall plan was in error, the reasons why should be disclosed. But, as presently constituted, 6(b) requires a dissenting Commissioner either to stay silent, skirt around identifying the company or product in any comments, or trudge through the time-consuming 6(b) review process with a firm that will inevitably cite the "unfairness" of any such contemplated action. None of these options is palatable for a Commissioner charged by law with the responsibility for protecting the public from unreasonable risk of injury.

Third, Congress should make clear that 6(b) does not apply information already in the public domain like newspaper and trade journal articles or citations from respected reference manuals. It is difficult to believe that taxpayer money is well-spent copying and forwarding pages of a Standard & Poor's listing, from a Commission file, to companies for their review and comment as to accuracy and fairness.

Fourth, questions about disclosing information pertinent to recalls should be cleared up. 6(b) shouldn't preclude the CPSC from informing the public about the existence of a recall in terms of how many or what percentage of the products were sent back or corrected. Like the FDA, we should be able to make available cumulative listings of recalled products. The public should know as much about potential product hazards as it does about poisoned Tylenol or tainted mushrooms.

Fifth, when we do conduct a recall we should be able to move quickly if the campaign doesn't work. Suppose we're not satisfied that consumers have either received the initial notice or acted upon it. Right now, there is some question whether we can repeat an alert, like a negotiated recall notice, without again seeking the firm's permission. Firms argue that re-release requires us to run the message through the 6(b) drill once again. This means additional delay while the potential for tragedy is ever-present.

In conclusion, we have made clear our desire to work with industry to reduce product risks, and in so doing, to balance the critical need for disclosing safety information to the public with adequate safeguards for the firms affected. I see our public hearing on 6(b) in April as a forum where some of our differences can be reviewed.

But the fundamental issues I have attempted to describe today can't be resolved as between CPSC and industry. They are tied to the explicit language which Congress has set forth in Section 6(b) of the Consumer Product Safety Act itself. The law needs to be changed if we are to be expected to satisfactorily carry out our mandate to rid the marketplace of unreasonable risks of injury. Letting the American public know early on about hazards or risks that we know about is essential to their informed choice in buying and using consumer products, and thereby, to our responsibility as Congress intended it.

[The following information was subsequently received for the record:]

#### QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

**Question 1.** Should the press be given inaccurate information in the interests of saving time and alerting the public to a possible hazard?

**Answer.** Release of information by a government agency such as the CPSC must be handled responsibly. Consequently, I could never condone the knowing release of inaccurate information to the press. A safety alert which is highly speculative can be costly both in emotions and dollars. A company's reputation might be unfairly tar-

nished and its profits slashed. The public may be needlessly alarmed. This practice could create an additional danger. The public might decline to act decisively in a real emergency, due to skepticism arising out of a false alarm.

What haunts this agency is not inaccurate information but rather the imbalance in our statute giving greater emphasis to a company's concern about misleading information than to the public's right to know about serious product risks. The CPSC is the only federal health or safety agency saddled with time-consuming, resource-intensive 6(b)-type provisions. We are the only such agency which must undergo egregious delays—months at a time—before disclosing safety information alerting the public to possible product hazards. If similarly bound, NHTSA could not timely notify car owners about defective tires and brakes; the Department of Agriculture would be precluded from promptly warning about tainted meat and dairy products.

In fact 6(b) assures that the Commission adhere to a higher degree of caution than that required of law enforcement agencies when releasing names of persons arrested for crimes. Product labels and firm names are getting greater protection than the law affords private citizens. This situation, quite simply, demand reform.

*Question. 2. Can you list all of the safety warnings to the public that have been weakened due to 6(b)?*

*Answer.* The tenacity and dedication of our enforcement staff offer a bulwark against ineffective product recall releases. Our staff works diligently to ensure only the release of basic information enumerating the threatened hazard and describing the product involved. However 6(b) forces the Commission into a terrible box. Firms have the right to sue the Commission to enjoin disclosure. With this statutory privilege, they can effectively and unilaterally delay public notification concerning a product safety problem. As a result, agency staff must all too often yield to company on the wording of our press releases to avoid further, life-threatening delays which may result from litigation.

For example, more than 200,000 potentially defective gas valves, used in liquid propane heating devices, were recalled after explosions caused at least five deaths and 21 serious injuries. But our safety alert didn't—couldn't warn about a related concern which may yet prove more serious. Instead, we could only allude to the continuing investigation of 2.5 million other valves, identical to the recalled propane units, used in furnaces fueled by natural gas. Another company refused to yield on the description of the potential hazard. Rather than refer to amputations caused by their product, the firm was adamant that the release discuss only finger-tip severances. Thus, the impact of this alert was compromised.

Examples such as these are too numerous to cite in detail. However, they only represent one facet of the problem. Weakening of safety messages does not come about just from the *wording* of an alert. The recurrent *delays* that plague the process loom as even more troublesome.

Section 6(b)—related delays meant that months passed before we could warn about a brand of garden-tractor batteries that were touching off explosions. Several months also elapsed before we could tell the public about a roto-tiller responsible for serious leg injuries and amputations. Six months passed before a release could be issued about a potential electrical hazard in homes from circuit breakers. Simply stated, delay caused by 6(b) provisions is a factor in every negotiated case involving a press release for public announcement.

Delays plague our FOIA activities too. While at all other federal health and safety agencies, individuals can receive a rapid response to a FOIA request, this is not the case at the CPSC. 6(b) has created a backlog which now numbers some 1800 requests. Proper 6(b) handling of a request may take months, even years. Currently, 75% of our FOIA requests take up to six months before collection of responsive documents can even *begin*.

With information so delayed, we lose an obvious ally: time. But, we also lose another helpful source to spread the word about product risks. The media has no incentive to wait for months on end for FOIA material requested to confirm leads and refine stories. There is no reason for a journalist to write a column about a recall which, in effect, is stale news. The result? The public loses out on information which could enhance their well-being.

Moreover, Commissioners efforts to promote safety are diminished. If this agency determines to commence a proceeding, a member may express his or her opinion free from 6(b) requirements. However, should the agency vote *not* to proceed, a Commissioner must either remain silent, skirt around identifying a firm in any comments, or jump through time-consuming 6(b) hoops. For example, by majority vote the Commission may decide to accept a Section 15 settlement agreement. As a dissenting Commissioner, I may feel vehemently that additional or more appropriate remedial action is necessary to redress a potential hazard. Yet, I am limited in my

actions to these three restrictive alternatives. None of these options is palatable for a Commissioner charged by law with the responsibility of protecting the public from unreasonable risk of injury. Imposing silence or delay on a Commission's responsible expression of concern about matters of public interest which affect the public health and safety unnecessarily deprives consumers of vital safety information to which they are entitled.

Senator KASTEN. The next panel includes Mr. Falk, Mr. Greenberg, Mr. Engel, Mr. Katz, and Mr. Popper.

Before panel No. 2 begins, I want to state that the subcommittee has been contacted by the Society of Professional Journalists, Sigma Delta Chi, which is the largest and oldest organization of journalists in the United States, an organization of which I am proud to say the editor of the Milwaukee Journal is a recent past president, and also the editor of the Milwaukee Sentinel is an active member.

The panelists should know that this distinguished organization has expressed its interest in the disclosure of public information by the Consumer Product Safety Commission. They will be submitting comments to the subcommittee after today's hearing, and if further hearings on this issue are held, the Society of Professional Journalists, Sigma Delta Chi, has expressed an interest in testifying, and the committee looks forward to working with them for the advice, for their guidance, and for the information which they can provide.

We will begin with Mr. Bernard Falk, who is the president of the National Electrical Manufacturers Association. He is accompanied by Robert Sussman. Mr. Falk.

**STATEMENTS OF BERNARD FALK, PRESIDENT, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, ACCOMPANIED BY ROBERT SUSSMAN; DAVID GREENBERG, CONSUMER FEDERATION OF AMERICA; RALPH ENGEL, PRESIDENT, CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, ACCOMPANIED BY CHARLES O'CONNOR III; MARTIN KATZ, GENERAL COUNSEL, CONSUMER PRODUCT SAFETY COMMISSION, ACCOMPANIED BY ALAN SCHOEM ASSISTANT GENERAL COUNSEL; AND ANDREW F. POPPER, ASSOCIATE PROFESSOR OF LAW, ASSOCIATE DEAN OF THE WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY**

Mr. FALK. Thank you, Mr. Chairman.

Our association, NEMA, opposes any weakening of section 6(b) safeguards. We feel strongly that the current 6(b) requirements are appropriate and provide manufacturers and private labelers an essential safeguard against disclosure of inaccurate or unfair information. Section 6(b) should be given an ample and an objective opportunity to prove its effectiveness.

The Consumer Product Safety Commission is the repository for a great deal of sensitive information relating to products and manufacturers. To provide for public access to that information while protecting concerned interests from premature, inaccurate, or misleading publicity about a product, Congress wrote the section 6(b) safeguards into the act.

These require the Commission to take reasonable steps to ensure that information it discloses is accurate, fair, and germane to the purposes of the statute. Since its enactment in 1972, the Commis-



sion's record has been one of resisting full compliance with 6(b) safeguards. The Congress and the courts have both made it clear that the Commission is expected to live by these rules, and that they apply to Freedom of Information Act requests as well as affirmative disclosures.

Since 1972, the Commission has interpreted its responsibilities under section 6(b) on an essentially ad hoc basis without formal regulations. Because of the absence of regulations, there have been no clear and workable policies and procedures to guide the Commission's activities under section 6(b). The result has been uncertainty, delay, and inefficiency, a situation that has benefited neither the Commission, the industry, nor consumers.

The conference report accompanying the 1981 amendments emphasized the value of sound regulations in implementing section 6(b) in an evenhanded and effective manner. A recent court decision has even enjoined the release of information subject to section 6(b) until regulations have been promulgated.

Responding to these expressions of concern, in 1981 the Commission began drafting rules to implement the statutory safeguards. Finally, in November of 1982 the Commission published its proposed regulations.

Even as it was receiving public comment on its proposed rule, however, the Commission has declared its intention to ask for a change in the statute, a relaxation of section 6(b). The Commission appears to feel that the law unduly restricts the public's access to vital health and safety information, and requires too much time, personnel, and money. Perhaps before making this judgment, the Commission would do well to see if it can work effectively within existing law.

The Commission, after all, is faced with a management problem: How to make certain that the information it proposes to disclose is accurate and fair, given the resources it has to work with. Is this problem insoluble? We do not think so.

The Commission can indeed work within the statutory limits, and can take affirmative steps that will insure the accuracy and fairness of information it discloses without either breaking its budget or diverting staff from other important projects.

We do not take the position that the Commission must necessarily conduct an in-depth investigation of every consumer complaint or an extensive evaluation of all other product-related information it proposes to disclose. By the same token, however, we cannot accept the Commission's proposals as sufficient and reasonable measures to insure accuracy.

This subcommittee has been provided copies of our detailed comments to the Commission. We have in every case proposed to the Commission alternative regulatory language which we feel protects the public's right to access, while providing manufacturers the full safeguards Congress intended. We will be glad to sit down with the Commission staff to discuss our recommendations, and feel certain we can work out our differences.

Let me emphasize that NEMA is not proposing to restrict access to information; to see the Commission "muzzled" or "gagged." We simply want to insure that any information released is accurate and that the disclosure is fair. It is really in the Commission's best

interest to have a deserved reputation for accuracy and fairness, both to maintain its credibility and objectivity and to encourage participation and cooperation by regulated parties.

Similarly, consumers expect information they receive from a Government agency to be accurate and not misleading. They are no better served by the dissemination of questionable safety information than the manufacturers whose products are unfairly called into question.

For these reasons, therefore, we believe section 6(b) must be allowed to stand, and the Commission should be directed to develop regulations governing information disclosure that include all the safeguards in the statute.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF BERNARD H. FALK, PRESIDENT, NATIONAL ELECTRICAL  
MANUFACTURERS ASSOCIATION

I am Bernard H. Falk, President of the National Electrical Manufacturers Association. NEMA is the nation's largest trade association for manufacturers of electrical products, and its 550 member companies supply the majority of electrical products used in permanent installation in homes (excluding appliances). The Association has a long-standing interest in consumer product safety legislation, and is on record as having supported the need for a Consumer Product Safety Act with an effective administrative body to make the Act's purposes workable. My testimony today will address the way in which the Consumer Product Safety Commission has responded to one important aspect of the Act—the information disclosure requirements of Section 6(b).

We are not the only ones with an interest in 6(b). The Commission has stated that amendment of this portion of the Act is one of its legislative priorities for this reauthorization. NEMA opposes any weakening of Section 6(b)'s safeguards. We feel strongly that the current 6(b) requirements are appropriate, and provide manufacturers and private labelers an essential safeguard against disclosure of inaccurate or unfair information. Section 6(b) should be given an ample and objective opportunity to prove its effectiveness.

In writing the Consumer Product Safety Act, Congress made the Commission the repository for a great deal of sensitive information relating to specific products and manufacturers. To provide for public access to that information, while protecting concerned interests from premature, inaccurate or misleading publicity about a product, Congress wrote the Section 6(b) safeguards into the Act. These require the Commission to take reasonable steps to assure that information it discloses is accurate, fair and germane to the purposes of the statute. Since its enactment in 1972, the Commission has resisted full compliance with Section 6(b)'s safeguards. It was necessary for the Supreme Court to rule that information released under the Freedom of Information Act (FOIA) was covered by Section 6(b) before the Commission would apply the statutory protections to FOI requests. Then, in 1981, Congress expressed its concern about the Commission's implementation of Section 6(b) and amended the Act to provide additional safeguards. Congress and the courts have both made it clear that the Commission is expected to live by these rules, and that they apply to Freedom of Information Act requests as well as affirmative disclosures.

Since 1972, the Commission has interpreted its responsibilities under Section 6(b) on an ad hoc basis, without formal regulations. Because of the absence of regulations, there have been no clear and workable policies and procedures to guide the Commission's activities under Section 6(b). The result has been uncertainty, delay and inefficiency—a situation that has benefitted neither the Commission, industry nor consumers.

The Conference Report accompanying the 1981 amendments emphasized the value of sound regulations in implementing Section 6(b) in an evenhanded and effective manner. A recent court decision has even enjoined the release of information subject to Section 6(b) until regulations have been promulgated. Responding to these expressions of concern, in 1981 the Commission began drafting rules to implement the statutory safeguards. Finally, in November 1982, the Commission published its proposed regulations.

If these reauthorization hearings were the impetus for the Commission to propose the (6)b regulations for public comment, then they serve as an endorsement of frequent reauthorization. When the Commission has not worked out how it will operate under statutory requirements in place since 1972, the Congress deserves an opportunity to review it in no more than two years. In our view, this will ensure that the Commission is fully responsive to the laws under which it must operate.

Even as it was receiving public comment on its proposed rule, however, the Commission declared its intention to ask for a change in the statute, a relaxation of Section 6(b). The Commission appears to feel that the law unduly restricts the public's access to vital health and safety information, and requires too much time, personnel and money. But perhaps before making this judgment, the Commission would do well to see if it can work effectively within existing law.

The Commission, after all, is faced with a management problem—how to make certain that the information it proposes to disclose is accurate and fair, given the resources it has to work with. Our concern is that its response has been not to try to solve the problem, but to try to make it go away.

But is the problem insoluble? We do not think so. NEMA has taken the approach that the Commission can indeed work within the statutory limits, and can take affirmative steps that will ensure the accuracy and fairness of information it discloses without either breaking its budget or diverting staff from other important projects. We do not take the position that the Commission must necessarily conduct an in-depth investigation of every consumer complaint, or an extensive evaluation of all other product-related information it proposes to disclose. By the same token, however, we cannot accept the Commission's proposals, such as returning a complaint to the complainant to verify its accuracy, as sufficient and reasonable measures to ensure accuracy.

NEMA has taken what we believe is a middle ground. We have emphasized the crucial role of industry comments in reviewing the accuracy and fairness of information and recognized that industry comments will influence how the Commission will perform its own responsibilities. For example, in the area of consumer complaints, we have urged that manufacturers and private labelers be the first to investigate and evaluate information regarding their products. Not only will the Commission's product safety investigations benefit from the comments of those who are most knowledgeable and technically competent, the Commission will be relieved of the expense and time required to conduct an in-depth investigation in every case. The Commission's role would be to follow up, to investigate issues, raised by manufacturers and others, and to contact consumers to clarify specific points or provide additional information. This is the centerpiece of our proposal: that industry and the Commission should cooperate in making sure that information to be disclosed is accurate and fair.

NEMA has many other concerns about the Commission's proposed Section 6(b) rule, and has stated them in our comments to the Commission. For example, we have expressed our disappointment about the agency's failure to seek public comment on its approach to Section 6(b)(6), which addresses the all-important area of information disclosures which relate to the safety of entire classes of products. We have also asked the agency to develop guidelines to govern the disclosure of preliminary hazard determinations under Section 15, engineering memoranda whose technical accuracy has been challenged, and minutes of closed meetings where voluntary corrective action has been discussed. In all of these areas, careless release of unverified information can cause great harm to manufacturers as well as undermine the cooperation between the Commission and the private sector that is so important to the agency's effectiveness.

This Subcommittee has been provided copies of our comments to the Commission, and we would be happy to supply more if needed. We have in every case proposed to the Commission alternative regulatory language which we feel protects the public's right to access, while providing manufacturers the full safeguards Congress intended. We will be glad to sit down with Commission staff to discuss our recommendations, and feel certain we can work out our differences.

Let me emphasize that NEMA is not proposing to restrict access to information, to see the Commission "muzzled" or "gagged." We simply want to ensure that any information released is accurate and that its disclosure is fair. It is in the Commission's best interest to have a deserved reputation for accuracy and fairness, both to maintain its credibility and objectivity and to encourage participation and cooperation by regulated parties. Similarly, consumers expect information they receive from a government agency to be accurate and not misleading. They are no better served by the dissemination of questionable safety information than the manufacturers whose products are unfairly called into question.



For these reasons, therefore, we believe Section 6(b) must be allowed to stand, and the Commission should be directed to develop procedures governing information disclosure that include all the safeguards in the statute. We see no reason for excluding information requested under the Freedom of Information Act from the statutory safeguards to assure accuracy and fairness. Unverified and misleading information released on the Commission's letterhead under the FOIA can cause as much harm to manufacturers and private labelers as information that the agency has affirmatively decided to disclose. Indeed, FOIA requests may often seek access to rough drafts, unverified complaints or incomplete analyses that the Commission has declined to release on its own precisely because they do not represent carefully considered and definitive Commission determinations. Such materials should, if anything, receive more scrutiny under Section 6(b), not less.

We likewise cannot accept the Commission's proposal to amend the statute so that FOIA release of documents accompanied by the manufacturer's comments is considered an adequate safeguard. The Commission has been charged with taking reasonable steps to assure accuracy and, as the courts have stated, it cannot transfer that responsibility to the recipient of the information it releases. Even if it is accompanied by the manufacturer's objections, information derived from the files of the federal agency responsible for product safety will have an aura of authenticity that will mislead consumers and harm manufacturers if the information is inaccurate or unfair. Thus, the only reasonable safeguard is to withhold such information from disclosure, not to release it along with the manufacturer's comments.

NEMA appreciates the opportunity to express our views before this Subcommittee, and reaffirms our willingness to work with the Commission and the Congress to resolve the information disclosure issue.

[The following information was subsequently received for the record:]

#### QUESTIONS OF THE MAJORITY AND THE ANSWERS THERETO

*Question 1.* Are you aware of any specific instances where a company was damaged by a disclosure of information which was in violation of 6(b)?

*Answer.* Many manufacturers and industry groups have been injured by the disclosure of inaccurate or unfair information in violation of Section 6(b). Unfortunately, some firms are reluctant to disclose the details of these incidents because they would prefer to avoid additional controversy about their products. Hence, it is impossible to recount every instance of CPSC non-compliance with Section 6(b) that has occurred over the years. A number of representative examples, however, vividly illustrate the harmful impact on industry of unauthorized disclosures and the importance of full adherence to the Section 6(b) safeguards.

In 1974, the Commission announced that certain spray adhesives could cause birth defects. The Commission later acknowledged that the scientific evidence underlying its announcement was unsound. Nevertheless, the publicity accompanying the Agency's initial action caused great alarm among consumers and substantial economic losses by spray adhesive manufacturers.

In 1980, The Commission staff sent a letter to a large number of firms that manufactured, distributed or sold clamp lamps. The letter asserted that these lamps presented a shock and electrocution hazard and announced a deadline for eliminating metallic lamp holders. Before sending the letter, the Commission made no effort to consult with manufacturers about the extent of the alleged safety problem or the feasibility of the Agency's proposed solution. Because the letter was broadly disseminated to distributors and retailers and reported in the trade press, serious marketplace disruption occurred that might have been avoided if Agency officials had asked the manufacturers to comment on the draft letter in advance.

In 1973, the Commission tested certain toys using a new protocol that the Commission had not yet fully evaluated. When the toys failed the test, the Commission included them on a list of hazardous products that was disseminated to retailers and consumers. Scientific experts later concluded that the Commission's test protocol was a limited value in assessing toy safety, and a court issued a preliminary injunction preventing the Commission from taking further action involving the manufacturer's products. *Clever Idea Co. v. CPSC*, 385 F. Supp. 688 (E.D.N.Y. 1974). In its opinion, the court found that, because of the publicity generated by the Commission, the manufacturer's sales had declined drastically and its "good will and reputation have unquestionably been irreparably injured."

In late 1980, the Commission negotiated a corrective action plan with a major manufacturer of water heater thermostats. Before the plan was announced, a televi-

sion station in the city where the manufacturer's headquarters was located carried a story quoting "Washington sources" as stating that the thermostats were defective. These "sources" were subsequently identified as Commission officials. When the Commission formally announced the manufacturer's corrective action plan several weeks later, it specifically stated that it had made no determination that the thermostats were defective—thus contradicting the earlier information that anonymous Commission employees had provided to the press. Nevertheless, consumers who had seen the original broadcast could have erroneously concluded that the thermostats were defective.

In 1982, a senior Commission official made a speech to representatives of toy manufacturers in which the official described a major chemical used in plastics as "carcinogenic." The Commission made no effort to consult with the chemical's manufacturers before this statement was made. The trade association for the toy industry subsequently recommended that the chemical be eliminated from its members' products. Later, however, it emerged that the evidence implicating the chemical as a carcinogen was fragmentary and incomplete and that there was no data showing that the chemical could cause cancer in humans. Nevertheless, expressions of alarm and disruption among industry members have continued.

The Commission recently released under the Freedom of Information Act a consultant's report analyzing the market for certain plasticizers alleged to be potential carcinogens. The report identified a large number of firms as manufacturers or users of these plasticizers. Before the report's release under the FOIA, no effort was made to verify these listings by contacting the firms involved. It later emerged that many of the firms did not in fact manufacture or use the plasticizers in question. The Commission took steps to prevent further release of the report but the original version was already in the public domain and had been widely circulated.

**Question 2.** The CPSC has proposed that the consumer who submits a complaint verify that complaint by reexamining it and by making corrections at that time. Do you know whether consumer complaints are generally inaccurate?

**Answer.** Having the consumer verify the accuracy of a complaint may on occasion be useful but NEMA does not believe that in itself, it constitutes a reasonable step to assure accuracy. There is usually no doubt in the consumer's mind that an accident or injury has taken place, and that fact is likely to be restated in verification. But the cause of the accident or injury is not so easily determined. Accidents which occur in the household environment can have numerous causes. It is common for the consumer to attribute injuries to products, when in fact the involvement of the product was only incidental. Moreover, most consumers lack relevant technical training or experience. As a result, they may provide the Commission with descriptions of product failure that are implausible or demonstrably incorrect. In fact, consumers often misidentify the manufacturer of the product being blamed for an accident or injury.

Returning complaints to consumers for confirmation simply will not provide additional assurance of accuracy. Most consumers will lack the knowledge and sophistication necessary for a critical reevaluation of their complaints. Hence, a consumer who did not understand a product's design or function at the time of the original complaint is unlikely to investigate these subjects merely because of the Commission's request for confirmation. Moreover, memories inevitably fade with the passage of time. Accordingly, if a consumer's original complaint was confusing or incomplete, it is unlikely that the consumer will be able to provide more reliable information when, several months later, the Commission asks the consumer to confirm that complaint. Thus, the confirmation process will rarely shed additional light on the causes or surrounding circumstances of the incident to which the complaint relates.

**Question 3.** Does the Commission's release of information under the Freedom of Information Act have any more potential to harm a product's reputation than the release of information by any other health and safety agencies? If so, why?

**Answer.** The release of adverse information by any health and safety agency has the potential to harm a product's reputation, and therefore it is the responsibility of all agencies to assure that such information is accurate and fair. The Commission's release of erroneous information is not likely to do more harm to any single product than similar action by any other health and safety agency, but cumulatively, the Commission's actions have a greater potential to harm industry as a whole. Congress has given the CPSC jurisdiction over a much wider spectrum of products than other agencies. With such a broad mandate, the Commission can hardly be expected to possess the same level of expertise as a more specialized agency which is responsible for a narrow class of products. As a result, the Commission often makes decisions and issues statements about the safety of products that it has not had an

opportunity to study exhaustively. Thus, there is a greater risk that the Commission's safety judgments may be in error, and a correspondingly greater need to provide product-specific information to manufacturers for comment before releasing it to the public.

Because the Commission regulates products used in or around the home, its public statements also have a greater potential for alarming consumers than those of other agencies, which often communicate with consumers through intermediaries. The Food and Drug Administration, for example, disseminates considerable information to doctors who evaluate its medical significance before passing it on to patients. By contrast, in the area of consumer products, the Commission in many cases is the only source of safety information. The consumer must therefore rely solely on the Commission for important guidance, and inaccurate or unfair information can have a very damaging impact on the welfare of consumers. Moreover, in responding to an FOIA request, the Commission has no idea how the information it releases may be eventually presented to the consumer; it cannot blindly disclose information from its files without first taking reasonable steps to assure accuracy.

In principle, there is no reason why the Section 6(b) safeguards should not apply to all agencies with health and safety functions; certainly all agencies have the same responsibility as the CPSC to assure the accuracy and fairness of the information they release. Rather than removing the 6(b) safeguards from the Consumer Product Safety Act, Congress might consider applying similar protections to other agencies if they demonstrate the same tendency to release unfair or inaccurate information as the Commission.

#### QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

*Question 1.* Outside of *GTE Sylvania*, are you aware of any specific incidents where unmerited adverse publicity has caused irreparable damage to an industry due to a release pursuant to an FOIA request?

*Answer.* *GTE Sylvania* is only one of a number of lawsuits challenging Commission efforts to release information under the FOIA without complying with Section 6(b). Other such suits include *Pierce & Stevens v. CPSC*, 439 F. Supp. 247 (W.D.N.Y. 1977) (involving FOIA disclosure of allegedly inaccurate reports of government inspections) and *Fountainhead Group v. CPSC*, 527 F. Supp. 294 (N.D.N.Y. 1981) (involving FOIA disclosure of allegedly unreliable accident reports and customer complaints concerning compressed air sprayers). In addition, at least one other suit to enjoin FOIA disclosure is pending; because the record in that case has been sealed, the manufacturer cannot be identified publicly.

None of these cases resulted in irreparable damage to the affected firms. Such damage was avoided, however, only because the Supreme Court's *GTE Sylvania* decision clearly establishes the Section 6(b) applies to FOIA requests and the firms involved were therefore able to obtain judicial protection against potentially harmful disclosures before they occurred. If judicial relief had been unavailable, the Commission would have released the information in question and these firms might well have suffered substantial harm.

*Question 2.* Has a member industry ever been in a position to request a retraction as a result of an FOIA release? What was the success of the retraction?

*Answer.* We know of no instance where an industry member has requested a retraction as a result of the release of information under the FOIA in violation of Section 6(b). In part, this situation reflects the availability of effective judicial relief against unlawful FOIA releases since the *GTE Sylvania* decision. If Section 6(b) were inapplicable to FOIA requests, the Commission undoubtedly would have released inaccurate or unfair information more frequently, and industry might have had greater occasion to request retractions.

It should be stressed that the availability of retractions after-the-fact is no substitute for applying Section 6(b) to FOIA requests in the first instance. The best safeguard against the release of inaccurate or unfair information is non-disclosure. Once such information is in the public domain, even the best publicized retraction may not fully erase misconceptions caused by the Commission's original release.

*Question 3.* What do you suggest would be "reasonable" steps to assure accuracy and fairness with respect to consumer complaints?

*Answer.* Under Section 6(b), the responsibility for assuring fairness and accuracy rests with the Commission. NEMA believes that, in performing this function, the Commission can assign manufacturers and private labelers a major role in assuring the accuracy of consumer complaints. Complaints should be submitted to the manufacturer when they are received. The manufacturer could then investigate the com-



plaint or evaluate it using existing technical information, and inform the Commission that the complaint is either accurate or implausible. Armed with the manufacturer's comments and explanatory material, the Commission could either approve the complaint for disclosure if the manufacturer verifies its accuracy, or conduct a follow-up evaluation with the consumer, manufacturer and its own resources to resolve differences.

This procedure would provide a greater assurance of accuracy and fairness than the Commission's recommendations, without requiring the Commission to conduct an in-depth investigation of every complaint. It would relieve the Commission of having to do the initial investigation and evaluation, while retaining its ultimate authority to decide what will be disclosed.

NEMA has recommended this procedure to the Commission, in its comments on the proposed 6(b) regulation. The procedure is spelled out in NEMA's alternative language for Section 1101.32(b)(5) of the proposed regulation:

"Consumer Complaints. (i) When the Commission receives a consumer complaint relating to a specific product, it will immediately forward that complaint to the product's manufacturer. In the cover letter accompanying the complaint, the Commission will ask the manufacturer to (1) investigate the complaint and inform the Commission of the results of that investigation, (2) provide the Commission with test data or other information that will assist the Agency in evaluating the consumer complaint, or (3) identify statements in the complaint that are incorrect, incomplete, confusing or ambiguous.

"(ii) Where the manufacturer submits comments on a consumer complaint, the Commission will take appropriate follow-up action. Such action may include (1) evaluating the accuracy of the complaint in light of the manufacturer's own investigation, (2) reviewing the complaint in light of the test data or other information provided by the manufacturer, or (3) contacting the complainant, by telephone or in writing, to request clarification of issues raised in the manufacturer's comments. Where the complainant responds to the Commission's inquiries and the Agency thereafter decides to disclose the complaint, it will provide a copy of the complainant's response to the manufacturer for additional comments under section 6(b) prior to disclosure.

"(iii) Where the manufacturer does not comment on the accuracy of a complaint and does not consent to its disclosure, the Commission will evaluate the complaint's accuracy on the basis of its knowledge of the safety of the product involved. For this purpose, the Commission will review any documents it possesses concerning the product and direct inquiries to knowledgeable members of its staff. In addition, the Commission will determine whether the complaint contains statements that are incorrect on their face, incomplete, confusing, ambiguous or implausible. In such situations, the Agency will contact the complainant, either by telephone or in writing, to request clarification of these aspects of the complaint. Where the complainant does not respond to this request or provides a response that is unsatisfactory, the complaint will be withheld from disclosure.

"(iv) The Commission will provide the manufacturer with an additional opportunity to comment on a consumer complaint if, at the time the complaint is considered for disclosure, more than 3 years have elapsed since the complaint was initially referred to the manufacturer for comment or if the manufacturer requested a second opportunity to comment in its initial comments.

"(v) The procedures described above do not apply to complaints received by the Commission before the effective date of this rule. Such complaints will not be disclosed since reasonable steps will not be taken to assure their accuracy."

**Question 4.** To what extent should industry shoulder the burden of assuring the accuracy of information to be disclosed?

**Answer.** Under the statute, the basic responsibility for assuring accuracy and fairness rests with the Commission. Nevertheless, providing information to manufacturers for comment is an integral step in the Section 6(b) review process, and the extensiveness of these comments will obviously influence how the Commission performs its own responsibilities. Thus, although its involvement will vary depending on the nature and source of the information, industry can and should take a major role in assuring accuracy and fairness. Obviously, a company that manufactures a product has the technical expertise and background data necessary to evaluate a claim of injury caused by the product. A company has access to products and facilities for testing, and is likely to be able to respond much quicker than a government agency with such broad product responsibility. Therefore, a manufacturer's comments should be given appropriate weight in evaluating the accuracy of information proposed to be disclosed.

In the matter of consumer complaints, NEMA proposes that manufacturers take a leading role in investigation and evaluation. Sending a complaint to the manufacturer for comment when it is received gives the Commission immediate access to a valuable source of technical and product information, and relieves the Commission of having to conduct its own investigation except when the manufacturer questions the complaint's accuracy. NEMA has proposed this approach to the Commission in its comments on the proposed 6(b) regulation, as noted in the response to the previous question.

**Question 5.** Should indepth studies and investigations done by CPSC or a qualified person or entity outside the Commission be presumed accurate for the purposes of disclosure?

**Answer.** No, it is arbitrary to conclude that documents prepared by Commission employees or qualified outsiders are automatically accurate. Commission employees, regardless of their technical competence, are not infallible. Their work should never be taken for granted without some effort to verify their conclusions. NEMA recommends that the CPSC information Group review each Commission-generated document proposed for disclosure, to analyze manufacturers' comments if any, and make inquiries within the Commission to determine if the documents reflect current information and are consistent with Commission policy.

Documents prepared by qualified outsiders need even more scrutiny to assure their accuracy. The Commission will often lack first-hand knowledge of the credentials of individuals who are not its employees and will rarely have an informed basis to assess their competence or expertise. Moreover, in many instances, the Commission will lack information about the circumstances in which these individuals have assessed a product's safety. Hence, it will not be in a position to determine whether their work is thorough or haphazard, whether they possess full or incomplete information, and whether they are disinterested or biased. Thus, documents prepared by outsiders, too, should be carefully reviewed by the Commission. In addition to the criteria for review by the Commission. In addition to the criteria for review of internal documents, the Commission should consider the expertise and background of the person generating the information, and the methodology by which the document was generated.

**Question 6.** If other health and safety agencies do not have 6(b) requirements, why should the CPSC?

**Answer.** Please refer to question three of the majority.

**Question 7.** Please give your views on the 5 suggestions provided by Commissioner Statler in his testimony to amend section 6(b). (See pages 8, 9, and 10.)

**Answer.** We have reviewed Commissioner Statler's suggestions for modifying Section 6(b). We believe the concerns he expresses reflect either a misunderstanding of Section 6(b)'s requirements or an unrealistic assessment of Section 6(b)'s impact on the Commission's ability to perform its regulatory functions. Our specific comments on Commissioner Statler's suggestions are as follows:

a. Commissioner Statler is correct that Section 6(b) is designed to protect firms from adverse publicity. The Commission's conception of adverse information, however, may not always be shared by manufacturers. Thus, it would be unwise to allow the Commission to dispense with the Section 6(b) safeguards simply because it believes the information to be released is favorable; the manufacturer may view the information in a very different light.

In borderline cases, it is best to err on the side of caution and allow the manufacturer an opportunity to comment on the information in question. If the information is in fact unobjectionable or even laudatory, the manufacturer will readily agree to its release. Indeed, a brief telephone call to the manufacturer may be enough to obtain its acquiescence. On the other hand, where legitimate questions about the information's accuracy of fairness exist, complying with Section 6(b) may alert the Commission to problems that it has failed to identify. Thus, adherence to the Section 6(b) safeguards in borderline situations may save the Commission from embarrassment while protecting manufacturers from publicity that may be well-intentioned but undesirable.

b. Commissioner Statler erroneously implies that Section 6(b) restrains Commissioners from issuing dissenting opinions in a wide range of situations. In fact, Section 6(b)(4) states that the Section 6(b) procedures do not apply when the Commission has instituted rulemaking, adjudicative or judicial proceedings under the Consumer Product Safety Act or has reason to believe that a manufacturer has acted unlawfully. Thus, in the great majority of cases where the Commission exercises its formal regulatory powers, the Section 6(b) review process will not operate, and individual Commissioners will be free to release any dissenting opinion they wish. For example, if the Commission issued a complaint under Section 15 but later settled

the matter by accepting a negotiated corrective action plan, adherence to Section 6(b) would be unnecessary and individual Commissioners could publicize their dissenting views without restriction.

Even where Section 6(b) applies, moreover, Commissioners will not be restrained from making their views known to the public. The Section 6(b) review process is designed to prevent unfair or inaccurate statements; manufacturers could not use that process to prevent Commissioners from airing honest differences of opinion on questions of law or policy. Thus, the Section 6(b) safeguards will be important only in the rare situation where an individual Commissioner issues a dissent in order to publicize adverse information about a particular product. Here, however, adherence to Section 6(b) will serve an essential purpose. There is no reason why individual Commissioners should have special license to make unreliable or reckless statements that normal Commission employees would not make. If the Commission as a whole has declined to adopt allegations about a product that are unproven or misleading, individual Commissioners should not use dissenting opinions as a conduit for releasing those allegations to the public.

c. Commissioner Statler's third suggestion is that Section 6(b) be inapplicable to information already in the public domain. In evaluating this suggestion, it should be remembered that the Commission often collects a wide variety of information from numerous sources. For this reason, plaintiffs' attorneys, members of the press and others use the Commission's files as a repository for product-specific information that is not readily available elsewhere. If this information is selected with a bias against the product involved, the result may be a dossier of materials that reflect adversely on the product's safety without presenting the manufacturer's point of view. For example, the Commission staff may contact plaintiffs' attorneys in pending personal injury actions for copies of all expert reports without requesting similar reports from defendants. Similarly, the Commission staff may compile copies of newspaper articles reporting alleged injuries associated with a particular product without contacting the manufacturer for rebuttal evidence.

If the Commission allows its files to be used as a general repository for product safety information, it has a responsibility to safeguard the rights of manufacturers who may be injured by the information that the Commission discloses. Under Commissioner Statler's approach, however, all such materials would be disclosed under the FOIA without any effort to seek the manufacturer's comments or assure that the materials are presented in a balanced and informative manner. The result would be the disclosure of one-sided and misleading information under the Commission's imprimatur—the precise situation that Section 6(b) was intended to avoid.

d. Commissioner Statler's fourth recommendation is that Section 6(b) be relaxed to enable the Commission to release more information pertaining to product recalls. This recommendation is perplexing. In negotiating a corrective action plan, it is common practice for the Commission and the affected company to agree on the content and scope of any notice to consumers. Thus, the negotiation process generally results in an informational program that is satisfactory to the Commission without Section 6(b) coming into play. Moreover, under most corrective action programs, it is the manufacturer, not the Commission, which assumes principal responsibility for informing consumers about the existence of a recall. Thus, if the Commission believes that a recall has been insufficiently publicized, it can ask the manufacturer to make additional efforts to notify consumers. If the manufacturer agrees, Section 6(b) will simply not apply.

e. Commissioner Statler asserts that Section 6(b) bars the Commission from releasing data concerning the effectiveness of a recall. However, in the past, corrective action plans negotiated by the Commission have specifically provided that such effectiveness data may be disclosed to the public without further review by manufacturers. Even where no such agreement exists, it is unlikely that most firms would oppose the release of recall effectiveness information, which is normally compiled by manufacturers themselves. Thus, a brief telephone call to the manufacturer may be sufficient to provide the requisite clearance for the information's disclosure.

Commissioner Statler suggests that Section 6(b) may bar the Commission from reissuing a recall announcement in order to generate additional publicity about the recall. If the announcement has already been cleared under Section 6(b), it would be unnecessary to provide the manufacturer with an additional opportunity to comment. On the other hand, if the Commission proposes to release new information about the recall that the manufacturer has not yet reviewed, the Section 6(b) safeguards should apply since the new information may be inaccurate or unfair. Commissioner Statler asserts that where the Commission seeks to publicize a recall, Section 6(b) procedures may cause delay "while the potential for tragedy is ever-present." If expeditious action is truly needed, however, Section 6(b) allows the Com-



mission to move quickly. Notice-and-comment procedures need not be followed where the Commission has filed an "imminent hazard" action under Section 12. And Section 6(b)(1) allows the Commission to reduce the manufacturer's time for comment where it finds that "the public health and safety" require expedited disclosure. Thus, the Commission can respond rapidly to genuine emergencies without sacrificing the protections that Section 6(b) affords.

Senator KASTEN. Mr. Falk, thank you.

Mr. David Greenberg, representing the Consumer Federation of America.

I would just like to say, David, and I have said this to you privately, I greatly appreciate the help that you have been to this committee and to our staff, working in an adversary position in most cases, or in a lot of cases, but your thoughtfulness, the efforts that you have made, the quality of the work that you are doing has been of tremendous help to us as we work in dealing with the Consumer Product Safety Commission, and as we work in dealing with the Federal Trade Commission, and as we work on products liability legislation.

I want to thank you No. 1, for being here today once more, but also for the quality of the work that you are doing and the efforts that you are making in working with this subcommittee. I thank you very much.

Mr. David Greenberg, representing the Consumer Federation of America.

Mr. GREENBERG. Thank you for those kind words, Senator Kasten. I hope you will bear with me. Certain people in the audience have suggested that for today, at least, the letters CFA stand for the Consolidated Frogs of America, but let me proceed.

I would also like to say that Americans for Democratic Action and Congress Watch join me in these remarks.

The information disclosure provisions of the CPSC statute—and the regulations the Commission has fashioned to implement those provisions—have become the political flashpoint of this current reauthorization. Frankly, we are at a loss to understand why.

From its inception, the CPSC has complied with over 50,000 information requests. Obviously, a good portion of these requests asked for information identifying specific companies. Yet in the 7 years prior to the *GTE-Sylvania* ruling, the Commission was sued only once by a manufacturer seeking to stop the release of information. That is simply an outstanding record.

Nevertheless, the disclosure of information has become so controversial that the CPSC has stopped releasing consumer complaints to the public. This situation is intolerable for several reasons.

First, genuinely valuable information is being kept from the public. Second, as you will hear from General Counsel Katz, the information disclosure scheme imposed on the Commission has simply become too cumbersome and too expensive.

Third, the proposals of certain industry groups threaten to make a bad situation worse. In its 6(b) comments, industry asks that the CPSC be required to investigate many consumer complaints prior to their release. Such a requirement threatens to divert Commission resources from important priority projects and threatens to put the Commission on the road to becoming a passive complaint

investigation agency, rather than a forward-looking force for product safety.

To avoid making a bad situation worse, Congress must intervene. We believe that the CPSC has done an impressive job under adverse conditions in fashioning its 6(b) regulations. The Commission has bent over backwards to be reasonable.

Let us look at the proposed process for releasing consumer complaints. When a complaint arrives at the CPSC, it will be sent immediately to the manufacturer. We applaud this policy, and hope it will be retained. If, in the future, that complaint is responsive to an information request, the CPSC sends the complaint to the company once again and allows 15 days for comment.

At the same time, it sends the complaint back to the original complainant and asks him or her to attest to its validity, to correct any mistakes, and to add any new information. Now if the company objects to the accuracy of the complaint, the Commission undertakes an independent evaluation of the complaint based on its in-house technical expertise. After that evaluation, the Commission may decide to release the complaint, notwithstanding the company's objections.

Before any such release, however, the Commission sends an additional notice of its intent, and allows the company 10 days to seek an injunction. Finally, unless the company objects, the Commission releases the comments of the manufacturer along with the complaint.

This is a complicated and costly process. In fact, I believe Professor Popper will tell you later that the due process accorded companies here compares quite favorably with that given a criminal defendant. Yet, as you have heard today, even that is not enough. Industry seeks more.

Let me respectfully urge that less, not more, is required. We ask that you bring the CPSC statute into line with those of other health and safety agencies. No other agency is forced to proceed through the labyrinth of process imposed on the CPSC, for good reason.

When a Government agency releases information like consumer complaints, it does not need to investigate or follow up in any way. All it needs to do is make absolutely clear that the complaint is just a complaint—the experience of one person with one product that the agency has not tested, evaluated, or subjected to any analysis. Such a clear disclaimer removes any hint of Government approval and tells the recipients that they are on their own.

Such a procedure serves the interests of disclosure without damaging business. Any attempt to use an unverified complaint as evidence of anything simply makes the user look foolish. It will not succeed with the media, with consumer groups, or with congressional committees.

Nor will it succeed in court. Consumer complaints are hearsay, pure and simple. No judge who understands the rules of evidence will admit them. Of course if industry proposals succeed and the CPSC is forced to investigate complaints, then consumer complaints may become a more potent litigation tool. That Government stamp of approval would be admissible and would have a real impact on many juries. Thus, the real courtroom threat comes from

adopting industry's position on 6(b), not from releasing consumer complaints with a simple disclaimer, as we propose.

Information generated by the Commission affirmatively presents a slightly different problem, but one that we believe can be resolved by a procedure much simpler than the one contemplated by the 6(b) regulations. When a CPSC document mentions a specific company or its product, prior to public release that company should be allowed to review it and to comment on any problems or inaccuracies.

That is, as I understand it, current Commission policy and I see no need for additional statutory or regulatory requirements. As long as they have notice and the opportunity to comment, companies can use their existing statutory power to enjoin inaccurate Commission statements.

These procedures require more of the CPSC than we expect of any other agency and serve the purposes of notice, fairness, and accuracy. Companies would have an opportunity to receive and review consumer complaints at the same time the Commission does. They would also have a full opportunity to evaluate and comment upon affirmative CPSC disclosures.

We believe that is as much as Congress should reasonably require. After all, the Commission is governed by a statute; the Administrative Procedure Act; its own regulations; Presidential appointment of, and senatorial consent to, its Commissioners; congressional oversight; and public and media evaluation and criticism of its actions. Those protections are enough for other agencies. They should be enough for the CPSC.

Thank you.

[The statement follows:]

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, ON BEHALF OF  
CONSUMER FEDERATION OF AMERICA

Senator Kasten, Consumer Federation of America (CFA) appreciates the opportunity to appear before you today to discuss a critical issue in the reauthorization of the Consumer Product Safety Commission (CPSC).

The information disclosure provisions of the CPSC's statute—and the regulations the Commission has fashioned to implement those provisions—have become the political flash point of this current reauthorization. We are at a loss to understand why.

From its inception, the CPSC has complied with over 50,000 FOIA requests. Obviously, a good portion of those requests asked for information identifying specific companies. Yet in the seven years prior to the *GTE-Sylvania* ruling, the Commission was sued only once by a manufacturer seeking to stop the release of information under the Freedom of Information Act. That is simply an outstanding record.

Nevertheless, the disclosure of information—especially consumer complaints—has become so controversial that, for the present, the CPSC has decided not to release consumer complaints to the public.

CFA believes that this situation is intolerable for several reasons.

First, genuinely valuable information is being kept from the public. It is clear from the recent Harris poll that Americans know of and trust the CPSC. It stands highest among Federal agencies in public esteem. So it is not a surprise that people turn to the Commission when confronted with an unsafe product.

Among the thousands of complaints to the CPSC each year, lie trends and patterns about potentially dangerous products. In many cases, this information does not exist anywhere else. Without it, researchers, public interest groups, and lawyers for injured persons cannot advance the cause of safety.

Let me give you a concrete example. Before the Commission stopped disclosing complaints, CFA was able to obtain valuable information regarding mobile home owners' experiences with formaldehyde gas in their homes. Based on that informa-



tion we were able to build a strong case before another agency—the Federal Trade Commission—that warnings about formaldehyde are required under section 5 of the FTC Act. What we received from the CPSC confirmed some of our suspicions, contradicted others, corrected some mistaken impressions and generally made our case more substantial. Without access to the CPSC complaints, we probably would have gone ahead anyway—but with certain erroneous allegations that the FTC might have spent hundreds of staff hours investigating. So we believe that the information disclosed by the CPSC saved CFA weeks of research, saved the FTC thousands of dollars, and, most importantly, may save hundreds of mobile home owners from the acute and chronic reactions to formaldehyde vapors.

Second, the current information disclosure scheme imposed on the Commission has become too cumbersome and too expensive. The CPSC receives approximately 10,000 Freedom of Information requests annually, with a current backlog of several thousand. Rarely are the requests processed within the 10-day limit required by the act. In fact, full 6(b) procedures can delay a request up to 6 months. For a public interest group working on a small budget and a short time frame, that sort of delay can destroy our ability to use the information once we receive it. Even this less than happy situation costs a great deal of money—at least \$1.5 million each year and countless hours of staff time.

Third, the proposals of certain industry groups threaten to make a bad situation worse. Industry comments on the Commission's proposed 6(b) regulations in many cases propose that the CPSC investigate consumer complaints prior to releasing them to the public. Such a requirement threatens to divert Commission resources away from important priority projects and to change the entire nature of the CPSC.

Let me illustrate. Approximately 40 percent of the FOIA requests to the Commission involve product complaints. For fiscal year 1982 that would have been 4,000. In that fiscal year, the CPSC's resources allowed it to conduct only 5,700 in-depth investigations. If it had been required to investigate even half of the consumer complaints under 6(b), over one-third of its investigations would have been consumed. Such a requirement would put the Commission on the road toward becoming an inefficient and passive complaint investigation agency rather than a forward-looking force for product safety.

To avoid making a bad situation worse, Congress must intervene. We believe that the CPSC has done an impressive job under adverse conditions in fashioning its 6(b) regulations. The Commission has bent over backwards to be reasonable to all sides.

Just look at the proposed process for releasing consumer complaints. When a complaint arrives at the CPSC it is immediately sent to the manufacturer. If, in the future, that complaint is responsive to an FOIA request, the CPSC sends the complaint to the company once again and allows 15 days for comment. At the same time, it sends the complaint back to the original complainant and asks him or her to attest to its validity, correct any mistakes and add any new information.

If the company objects to the accuracy of the complaint, the Commission undertakes an independent evaluation of the complaint based on in-house technical expertise. Based on the evaluation, the Commission may decide to release the complaint not withstanding the company's objections. Before any such release, however, the Commission sends an additional notice of its intent and allows the company 10 days to seek an injunction. Finally unless the company objects, the Commission releases the comments of the manufacturer with the complaint. To us, this is a complicated and costly process for disclosing a consumer complaint about a toaster that caught fire, for example. In fact, I believe Professor Popper will tell you that the due process accorded companies here compares quite favorably with that given a criminal defendant. That seems a little out of line.

Yet, as you have heard today, even that is not enough. Industry seeks more.

Let me respectfully urge that less, not more, is required. Let us stop the Commission from an inefficient, costly, and unnecessary set of procedures by bringing the CPSC statute into line with those of other health and safety agencies. For no other agency is forced to proceed through the labyrinth of process imposed on the CPSC.

For good reason. When a Government agency releases information like consumer complaints, it does not need to investigate or follow up in any way. All it needs to do is make absolutely clear that the complaint is just a complaint—the experience of one person with one product that the agency has not tested, evaluated or subjected to any analysis. Such a clear disclaimer removes any hint of Government imprimatur and tells the recipients of FOIA information that they are on their own. Such a procedure serves the interest of disclosure without damaging business in any regard. Any attempt to use an unverified complaint—especially an isolated one—as evidence of anything simply makes the user look foolish. It will not succeed with the

media, with consumer groups, congressional committees or consumer protection agencies.

Nor will it succeed in court. Consumer complaints are hearsay pure and simple—no judge who understands the rules of evidence will admit them. Of course, if industry proposals succeed and the CPSC is forced to investigate complaints, then consumer complaints may become a more potent litigation tool. Such a Government stamp of approval would be admissible and would have a persuasive impact on many juries. Thus, the real courtroom threat comes from adopting industry's position on 6(b), not from releasing consumer complaints with a simple disclaimer, as we propose.

Information generated by the Commission presents a slightly different problem, but one that we believe can be resolved by a procedure much simpler than the one contemplated by the Commission's 6(b) regulations. When a CPSC document mentions a specific company or its product, prior to public release that company should be allowed to review it and comment on any problems or inaccuracies.

That is current Commission policy and I see no need for additional statutory or regulatory requirements. As long as they have notice and the opportunity to comment, companies can use their existing statutory power to seek court action to enjoin what they believe to be inaccurate Commission statements.

These procedures, which I believe would require more of the CPSC than we expect of any other agency, serves the purposes of notice, fairness, and accuracy without imposing undue burdens. Companies would have an opportunity to receive and review consumer complaints at the same time the Commission does. They would also have a full opportunity to evaluate and comment upon affirmative CPSC disclosures. We believe that is as much as Congress should reasonably require. After all, the Commission is governed by a statute; the Administrative Procedure Act; its own regulations; Presidential appointment or, and senatorial consent to, its commissioners; congressional oversight; and public and media evaluation and criticism of its actions. Those protections are enough for other agencies. They should be enough for CPSC.

Thank you.

[The following information was subsequently received for the record:]

CONSUMER FEDERATION OF AMERICA,  
Washington, D.C., March 17, 1983.

HON. ROBERT W. KASTEN, Jr.,  
Russell Senate Office Building,  
Washington, D.C.

DEAR SENATOR KASTEN: Each year 25,000 people die and 34,000,000 suffer injuries in accidents involving consumer products. Adequate funding of the Consumer Product Safety Commission (CPSC) will be a major factor in determining whether the public will be protected from even higher injury and death rates resulting from unsafe products.

During the 2 years you have presided over the Consumer Subcommittee you have had many opportunities to examine the CPSC, talk with the Commissioners and consider all the issues involved in providing strong product safety protection to the public. While we did not always agree with you on the last reauthorization bill, we greatly appreciated your efforts to preserve the Commission as the legislative process came to a close.

These last 2 years have demonstrated that the budget cuts of 1981 were ill-advised. The CPSC simply cannot do an adequate job with the funds currently at its disposal. The lack of Commission resources hurts industry as well as consumers. Lacking the contract dollars, staff time and scientific expertise to handle voluntary and mandatory rulemaking proceedings, the CPSC more and more will be forced to draw out its efforts over years. During that process, industry will remain uncertain of the outcome and will not be able to plan its production and marketing with any degree of precision.

In addition, the CPSC budgetary limitations are making it very difficult for the Commission to encourage voluntary industry compliance. Sensing a weakened policing function by the CPSC, business has already reduced its voluntary reporting of possible product hazards by 52 percent between 1979 and 1982.

The Commission's ability to deter unsafe business conduct will be weakened still further if its budget is cut once again. Compared to 1980 levels, the administration's proposed CPSC funding will force company inspections to fall by 65 percent, recall checks by 84 percent and product samples collected by 56 percent.

We believe such cuts are tantamount to killing the Commission. Its ability to promote product safety efforts through voluntary compliance hinges on the genuine power to require safe products through effective mandatory action. The ban on urea formaldehyde foam insulation in homes, the recall of asbestos hair dryers and mandatory design standards for child resistant caps are examples.

These and other product safety activities have gained the Commission wide acceptance from the public. The CPSC stood alone among federal agencies in a recent Harris Poll, receiving the only overwhelmingly positive rating.

For all the above reasons, CFA hopes you will consider restoring the budget authority lost by the Commission in 1981. To even bring the CPSC's purchasing power back to 1981 levels will require in the neighborhood of \$48 million. The request by the Administration, \$32 million, is simply unacceptable. It will only serve to weaken the Commission and threaten the public. It will also put pressure on the product liability system, for private lawsuit are the only alternative to strong government commitment to product safety.

I know time is extremely short but I would be glad to meet with you if I can be of any help on this matter.

Sincerely,

DAVID I. GREENBERG, *Legislative Director.*

Senator KASTEN. Mr. Greenberg, thank you very much.

The next witness is Mr. Ralph Engel, the president of the Chemical Specialties Manufacturers Association.

Mr. Engel.

Mr. ENGEL. Thank you very much, Mr. Chairman.

We appreciate the opportunity to appear before this subcommittee and present CSMA's position. The last time CSMA testified before this subcommittee on CPSC reauthorization was in 1981, and we had a number of changes we felt were needed in the Commission's mandate. We are pleased to see that as a result of this subcommittee's efforts in 1981, CPSC is a more responsible agency today.

One area addressed by Congress in 1981 but still in need of oversight is the matter of disclosure of unverified information by the agency. We feel that this subcommittee and the Congress as a body addressed a troublesome situation by amending section 6(b) of the Consumer Product Safety Act to reinforce CPSC's duty, imposed in the original 1972 legislation, to take reasonable steps to insure the accuracy of information it discloses to the public. This recent amendment was needed to reform the agency's past practice of releasing inaccurate or misleading data that reflected adversely on manufacturers of specific consumer products.

The function of section 6(b) is not to prevent CPSC from alerting the public to genuine product hazards, but rather to stop the Commission from releasing misinformation. Inaccurate information can ruin the reputation of a product or its manufacturer, regardless of any subsequent correction or clarification. This problem is especially acute for small businesses, since their product line is generally less diversified, making them particularly vulnerable to adverse publicity. The irreversible damage which can be caused to consumer products by misinformation is the reason why section 6(b) requires greater care by CPSC than by other Federal agencies.

While Congress moved to strengthen the existing law, CPSC has been reluctant to accept its responsibilities under this section. The agency's recently proposed rule to implement section 6(b) would create loopholes in the administration of its duties and undermine the congressional intent that the Commission make a sincere effort



to release only accurate, verified information. We are attaching CSMA's comments on this proposal for the record.

The function of section 6(b) is to counterbalance CPSC's broad powers to obtain information on a wide variety of consumer products. The material collected through section 15 substantial product hazard reports, subpoenas, or consumer complaints may be extremely sensitive. Each employee at CPSC should recognize the damage which can occur due to the simple release of inaccurate information with the Federal Government's imprimatur.

We are concerned that the CPSC may circumvent the procedural safeguards through its implementation of the proposed section 6(b) regulation. For example, the proposed rule equates filing a petition for rulemaking with the initiation of a rulemaking proceeding. Since section 6(b) protections do not extend to rulemaking proceedings, if someone wishes to obtain information in the agency's files and wants to avoid a section 6(b) review, that party could file a petition for rulemaking along with a Freedom of Information Act request. The proposal would eliminate the section 6(b) protections upon the filing of the petition even if the petition never results in a rulemaking proceeding because it has no merit, and is routinely denied by the Commission. In anticipation of this problem, Congress stated in section 6(b)(4) that a rulemaking proceeding "shall commence upon the publication of an advance notice of proposed rulemaking or a notice of proposed rulemaking," not the filing of a petition. The proposed rule, therefore, contradicts the clear statutory language and creates a new exception to the section 6(b) protections.

Another important provision in the proposal would equate obtaining a statement from a consumer that he or she in fact made a complaint to CPSC with the agency taking reasonable steps to verify the accuracy of the complaint. The agency wishes to limit its responsibility to affirming that the consumer has made a statement, not that the statement is accurate. It is particularly disturbing that the proposal considers an allegation sufficiently accurate if someone makes a personal observation about a defect, even if no injury has occurred and even if the individual has no technical expertise concerning the product. We do not believe that this process is all that Congress intended when it required CPSC to ascertain the reliability of information released.

In addition, the November 5 proposal would sidestep the statutory provisions in a number of other ways which are included in our testimony, and I will not cover them all.

Since CPSC has not yet implemented section 6(b) with regard to the 1981 amendments, we feel that it is inappropriate to make any legislative changes until we have given the amendments a chance to work. Unfortunately, CPSC views the section 6(b) safeguards as burdensome, and has notified Congress of its desire to see these important protections cut back. We respectfully urge this subcommittee and the Congress to give the section 6(b) amendments of 1981 an opportunity to be implemented; and further urge that any amendments to weaken the section 6(b) safeguards be rejected as unnecessary.

CPSC's position is to confine section 6(b) to affirmative disclosures by the agency, and not responses to FOIA requests. A few

years ago, CPSC devoted substantial resources to legally contesting the applicability of section 6(b) to FOIA requests, a process which resulted in a Supreme Court finding that the safeguards apply in such circumstances. In *CPSC v. GTE Sylvania*, the Court responded to CPSC's claim by concluding:

Our interpretation of the language and legislative history of section 6(b)(1) reveals that any increased burdens imposed on the Commission as a result of its compliance with section 6(b)(1) were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission.

Three years later, we find that CPSC is still contesting the applicability of section 6(b) to FOIA requests and asking for legislative changes instead of implementing the statute. CPSC's reluctance to commit the resources necessary to making its public statements as accurate as possible belittles the importance of section 6(b). We respectfully urge this subcommittee to direct the CPSC to modify the proposed rule significantly in order to implement section 6(b) in accordance with congressional intent.

Mr. Chairman, recognizing that this is a panel on section 6(b), we would nevertheless like to make a brief comment on the overall reauthorization of the agency.

We believe that CPSC's mission benefits both consumers and industry. To that end, we urge this subcommittee to reauthorize the Commission for 2 years at the funding levels requested by the administration. Since CPSC as an independent regulatory body is directly responsible to Congress, it is appropriate that every 2 years each Congress have the opportunity to review and possibly revise the agency's role. Any longer period would insulate CPSC from congressional concerns and diminish the opportunity to improve the Commission's operations.

In 1981, for example, we saw the agency given a clearer direction in the regulation of chronic hazards through the creation of chronic hazard advisory panels. Congress also improved CPSC's mandate by instructing the Commission to rely on voluntary standards wherever possible.

These two improvements might not have occurred had Congress previously extended CPSC's reauthorization for a lengthy period of time. We urge this subcommittee to rely again on a 2-year reauthorization to assure continued opportunities to enhance the Commission's performance. We appreciate the consideration this subcommittee is giving to CSMA's concerns, and we are available to respond to any questions you may have.

Thank you, sir.

[The statement follows:]

STATEMENT OF RALPH ENGEL, PRESIDENT, CHEMICAL SPECIALISTS MANUFACTURERS ASSOCIATION

I am Ralph Engel, President of the Chemical Specialists Manufacturers Association (CSMA). I am accompanied today by Charles O'Connor of McKenna, Conner & Cuneo, our general counsel.

CSMA is a voluntary, nonprofit trade association consisting of nearly 400 member companies in the chemical specialties industry. These companies produce a wide variety of consumer products, including detergents, cleaning compounds, waxes, polishes, floor finishes, automotive chemicals such as brake fluid and antifreeze, and other consumer products subject to the jurisdiction of the Consumer Product Safety Commission (CPSC).

Mr. Chairman, we appreciate the opportunity to appear before this subcommittee and present CSMA's position. The last time CSMA testified before this subcommittee on CPSC re-authorization was in 1981, and we had a number of changes we felt were needed in the Commission's mandate. We are pleased to see that, as a result of this subcommittee's effort in 1981, CPSC is a more responsible and streamlined agency today.

One area addressed by Congress in 1981 but still in need of oversight is the matter of disclosure of unverified information by the Agency. We feel that this subcommittee and the Congress as a body addressed a troublesome situation by amending Section 6(b) of the Consumer Product Safety Act to reinforce CPSC's duty, imposed in the original 1972 legislation, to take reasonable steps to assure the accuracy of information it discloses to the public. This recent amendment was needed to reform the Agency's past practice of releasing inaccurate or misleading data that reflected adversely on manufacturers or specific consumer products.

The function of Section 6(b) is not to prevent CPSC from alerting the public to genuine product hazards, but rather to stop the Commission from releasing misinformation. Inaccurate information can ruin the reputation of a product or its manufacturer, regardless of any subsequent correction or clarification. This problem is especially acute for small businesses, since their product line is generally less diversified, making them particularly vulnerable to adverse publicity. The irreversible damage which can be caused to consumer products by misinformation is the reason why Section 6(b) requires greater care by CPSC than by other federal agencies.

While Congress moved to strengthen the existing law, CPSC has been reluctant to accept its responsibilities under this Section. The Agency's recently proposed rule to implement Section 6(b) would create loopholes in the administration of its duties and undermine Congressional intent that the Commission make a sincere effort to release only accurate, verified information. We are attaching CSMA's comments on this proposal for the record.

The function of Section 6(b) is to counterbalance CPSC's broad powers to obtain information on a wide variety of consumer products. The material collected through Section 15 substantial product hazard reports, subpoenas, or consumer complaints may be extremely sensitive. Each employee at CPSC should recognize the damage which can occur due to the simple release of inaccurate information with the federal government's imprimatur.

We are concerned that CPSC may circumvent the procedural safeguards through its implementation of the proposed Section 6(b) regulation. For example, the proposed rule equates filing a petition for rulemaking with the initiation of a rulemaking proceeding. Since Section 6(b) protections do not extend to rule-making proceedings, if someone wishes to obtain information in the Agency's files and wants to avoid a Section 6(b) review, that party could file a petition for rulemaking along with a Freedom of Information Act (FOIA) request. The proposal would eliminate the Section 6(b) protections upon the filing of the petition even if the petition never results in a rulemaking proceeding because it has no merit and is routinely denied by the Commission. § 1101.46(b)(1). In anticipation of this problem, Congress stated in Section 6(b)(4) that a rulemaking proceeding "shall commence upon the publication of an advance notice of proposed rulemaking or a notice of proposed rulemaking", not the filing of a petition. The proposed rule, therefore, contradicts the clear statutory language and creates a new exception to the Section 6(b) protections.

Another important provision in the proposal would equate obtaining a statement from a consumer that he or she in fact made a complaint to CPSC with the Agency taking reasonable steps to verify the accuracy of the complaint. § 1101.32(a). The Agency wishes to limit its responsibility to affirming that the consumer has made a statement, not that the statement is accurate. It is particularly disturbing that the proposal considers an allegation sufficiently accurate if someone makes a personal observation about a defect even if no injury has occurred and even if the individual has no technical expertise concerning the product. We do not believe that this process is all the Congress intended when it required CPSC to ascertain the reliability of information released.

In addition, the November 5th proposal would sidestep the statutory provisions in the following ways:

The proposal would not apply Section 6(b) protections to information inadvertently disclosed at Commission meetings, § 1101.26(b)(2);

The proposal would not apply Section 6(b) safeguards where the identity of the manufacturer of a product is evident to "only a few members of the trade" or where the public "would need to do research in order to learn the identity of the manufacturer," despite the risk to a manufacturer's reputation whenever its identity can be determined, § 1101.13;



The proposal would not apply Section 6(b)(5) protections (regarding Section 15 substantial product hazard reports) to information independently obtained by CPSC staff, even if it was the company's Section 15 report that allowed the Agency to obtain the information, § 1101.63(c);

The proposal would not apply Section 6(b) to disclosures by the Agency regarding products outside of its jurisdiction, § 1101.11(a)(1);

Where a firm has commented on a consumer complaint, CPSC could summarize the company's views and release the summary rather than the full text, along with the complaint, despite Section 6(b)(1)'s requirement that any summary be prepared by the manufacturer, § 1101.21(b)(4); and

CPSC's notice to the manufacturer prior to disclosure could be as short as fifteen calendar days from the date of the Agency's letter to the company, rather than the 30 days notice in Section 6(b)(1), § 1101.22.

Since CPSC has not yet implemented Section 6(b) with regard to the 1981 amendments, we feel that it is inappropriate to make any legislative changes until we have given the amendments a fair chance to work. Unfortunately, CPSC views the Section 6(b) safeguards as burdensome and has notified Congress of its desire to see these important protections cut back. We respectfully urge this subcommittee and the Congress to give the Section 6(b) amendments of 1981 an opportunity to be implemented, and further urge that any amendments to weaken the Section 6(b) safeguards be rejected as unnecessary and untimely.

CPSC's position, as expressed in a December 21, 1982 letter from CPSC Director of Congressional Relations Edward D. Harrill to Congressman Henry Waxman, is to confine Section 6(b) to "affirmative disclosures" by the Agency, and not responses to FOIA requests. A few years ago, CPSC devoted substantial resources to legally contesting the applicability of Section 6(b) to FOIA requests, a process which resulted in a Supreme Court finding that the safeguards apply in such circumstances. *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The Court responded to CPSC's claim that compliance with the safeguards would impose insurmountable burdens on the Agency by concluding:

"[O]ur interpretation of the language and legislative history of § 6(b)(1) reveals that any increased burdens imposed on the Commission as a result of its compliance with § 6(b)(1) were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission." *Id.*, at 123-124.

Three years later, we find that CPSC is still contesting the applicability of Section 6(b) to FOIA requests and asking for legislative changes instead of implementing the statute. CPSC's reluctance to commit the resources necessary to making its public statements as accurate as possible belittles the importance of Section 6(b). We respectfully urge this subcommittee to direct CPSC to modify the proposed rule significantly in order to implement Section 6(b) in accordance with Congressional intent.

Recognizing that this is a panel on Section 6(b), we would nevertheless like to make just a brief comment on the overall re-authorization of the Agency. We believe that CPSC's mission benefits both consumers and industry and, to that end, we urge this subcommittee to re-authorize the Commission for two years at the funding levels requested by the Administration.

Since CPSC as an independent regulatory body is directly responsible to Congress, it is appropriate that every two years each Congress have the opportunity to review and possibly revise the Agency's role. Any longer period would insulate CPSC from Congressional concerns and diminish the opportunity to improve the Commission's operations. In 1981, for example, we saw the Agency given a clearer direction in the regulation of chronic hazards through the creation of Chronic Hazard Advisory Panels. Congress also improved CPSC's mandate by instructing the Commission to rely on voluntary standards wherever possible, thus allowing industry the opportunity to correct actual or potential problems. These two improvements might not have occurred had Congress previously extended CPSC's re-authorization for a lengthy period of time. We urge this subcommittee to rely again on a two-year re-authorization to assure continued opportunities to enhance the Commission's performance.

We appreciate the consideration this subcommittee is giving to CSMA's concerns and we are available to respond to any questions you may have.

[The following information was subsequently received for the record:]

# QUESTIONS OF THE MAJORITY AND THE ANSWERS THERETO

**Question 1.** Are you aware of any specific instances where a company was damaged by a disclosure of information which was in violation of 6(b)?

**Answer.** In one instance, a member of the Chemical Specialties Manufacturers Association (CSMA), along with other companies in the industry, had to drop production of spray adhesives due to CPSC allegations, later retracted by the Agency, that the product caused birth defects. The company decided to limit the damage to its reputation and ceased production so as not to prolong the debate. As a result, there was never a court decision finding CPSC in violation of Section 6(b). To the best of our knowledge, there are no spray adhesives currently being sold. This is a classic case of a product being forced off the market, not by regulatory action, but by public statements by CPSC officials.

One case not involving a CSMA member which resulted in a judicial decision was *Clever Idea Co., Inc. v. CPSC*, 385 F. Supp. 688 (E.D.N.Y. 1974). In that case, CPSC announced that certain toy horns were banned hazardous substances even though the company had produced 60 million units over 30 years without receiving a single complaint. CPSC's own employees admitted that they had never received a complaint and knew of none, and yet tried to enforce a "bite test" which had never been promulgated as a final rule. The District Court found that the company's good will and reputation were irreparably injured, and granted an injunction preventing CPSC from bringing any enforcement action.

These incidents and others like them show that careless disclosures can damage manufacturers without contributing to the public safety or consumers' ability to make informed decisions.

**Question 2.** The CPSC has proposed that the consumer who submits a complaint verify that complaint by re-examining it and by making corrections at that time. Do you know whether consumer complaints are generally inaccurate?

**Answer.** CSMA is most familiar with household chemical products. Consumer complaints regarding these products often correctly state a physical symptom, such as a skin rash, but are very rarely accurate about causation. This conclusion has been documented in a scientific study published in a medical journal, where 300 adverse reaction allegations relating to a new cleaning product were studied. Of the 70% who allowed medical followup testing to examine the alleged injury, a skin complaint, none was found to have a complaint based in fact on that product. (Weaver, J. and Herrmann, K., "Evaluation of Adverse Reaction Reports for a New Laundry Product", 4 Journal Amer. Acad. of Dermatology 557-583 (1981)).

Release of consumer complaints under such circumstances can unjustifiably sully the reputation of a product or a manufacturer with no benefit to the public. We therefore believe it prudent for CPSC to refrain from disclosing consumer complaints unless it has verified their accuracy, and not just the fact that a consumer made a particular statement.

**Question 3.** Does the Commission's release of information under the Freedom of Information Act have any more potential to harm a product's reputation than the release of information by any of the other health and safety agencies? If so, why?

**Answer.** A disclosure by CPSC is potentially more damaging and irreversible because it can have an immediate effect on consumer behavior and the sales of the company. The Agency regulates consumer products by name, not just by ingredient. A statement from CPSC regarding the alleged carcinogenic effect of using a product, for example, is likely to cause an immediate halt in consumer purchases, and the fear which remains after any clarification is issued would prevent a recovery in product sales. This action has a greater impact on a product's reputation than releases by the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA). A statement by EPA or OSHA about a chemical will have more of an impact on those who are trained to examine such issues, than on consumers, who may not have heard of the chemical. A release by CPSC about a specific household product, however, can cause great alarm with little chance of rehabilitating the item's reputation.

In addition, CPSC has a very diverse jurisdiction compared to health and safety agencies such as the Food and Drug Administration and the National Highway Traffic Safety Administration. While other agencies have the in-house expertise to evaluate the correctness of certain technical data, CPSC, by the very nature of its broad mandate, has to deal with unusual factual situations for which it lacks full internal capabilities. As a result, it is important for CPSC to have a close working relationship with industry so as to benefit from the private sector's experience.

Congress recognized this problem when it created Section 6(b) to protect manufacturers from unjustified adverse publicity which could result from CPSC exercising

its extensive powers over products with which it may not be especially familiar. This counterbalance is very important at CPSC, and the Commission's procedures should not be lowered to other agencies' standards, as they are not relevant to CPSC.

**Question 4.** Why would the Commission's release of information under the Freedom of Information Act have any more potential to harm a product's reputation than the release of information by any other health and safety agency?

**Answer.** Please refer to the answer to the preceding question.

**Question 5.** Chemical Specialties Manufacturers Association's Section 6(b) comments on "reasonable steps to assure accuracy" objected to the use of consumer confirmation as a reasonable step, but failed to specifically identify what steps CSMA believes would be reasonable. What, if anything, should the Agency do so assure accuracy?

**Answer.** CSMA has no objection to consumer confirmation of a complaint, and in fact we urge CPSC to use this procedure routinely. We believe, however, that Section 6(b) requires the Commission to do more in order for the process to constitute a "reasonable step". While the procedures may vary, it would be sound practice for CPSC to conduct standard technical tests such as those approved by the American Society for Testing and Materials or the American National Standards Institute, or ask the manufacturer what procedures it uses to eliminate product problems or respond to consumer concerns. Since the manufacturer may have seen similar consumer allegations before and may be able to replicate the situation, the company may be able to tell CPSC what needs to be done to verify or discount the complaint. CPSC could then conduct the necessary tests to reproduce these results.

**Question 6.** Given the constraints on the CPSC budget, how would you propose that the Agency allocate its resources between the verification of consumer complaints and its other product safety activities?

**Answer.** A rigorous answer to this question would require CSMA to step into the role of the Commission and completely review CPSC's budget with an eye to eliminating unproductive, duplicative, or inefficient programs and allocating the available funds to the most cost-effective projects. Although such a response is beyond the scope of these comments, we note that the management of the Agency has to include expenses for certain basic functions such as verifying the accuracy of statements before releasing them. If CPSC does not know whether information is accurate, and decides not to go to the expense of investigating the situation, then it should go about its activities and refrain from issuing any public statements.

#### QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

**Question 1.** Outside of *GTE Sylvania*, are you aware of any specific incidents where unmerited adverse publicity has caused irreparable damage to an industry due to a release pursuant to an FOIA request?

**Answer.** As previously mentioned, there have been incidents of unmerited adverse publicity causing irreparable damage to manufacturers. The cases that have come to our attention did not stem from releases pursuant to an FOIA request, although we are aware of incidents where a manufacturer invoked its Section 6(b) rights and convinced CPSC not to make a potentially damaging disclosure. In the FOIA area, then, Section 6(b) has served a preventive function.

**Question 2.** Has a member industry ever been in a position to request a retraction as a result of an FOIA release? What was the success of the retraction?

**Answer.** We are not aware of a company or industry seeking a retraction as a result of an FOIA release, perhaps because a retraction is of little value once CPSC has made a damaging disclosure. One non-FOIA case illustrating the futility of a retraction occurred in the previously mentioned spray adhesive case, where CPSC issued six separate news releases to announce supposed hazards but only one news release to announce the Commission's intention to reverse its previous action. In the meantime, CPSC field staff had asked retailers as well as county and local agencies to check store shelves, leading non-CPSC personnel to check 19,000 retail stores and incur \$414,000 in time costs as of a date three months before CPSC's retraction. See (1972-1975 Transfer Binder) Consumer Product Safety Guide (CCH) ¶ 41469.

**Question 3.** What do you suggest would be "reasonable" steps to assure accuracy and fairness with respect to consumer complaints?

**Answer.** Please refer to the answer to majority question No. 5.

**Question 4.** To what extent should industry shoulder the burden of assuring the accuracy of information to be disclosed?



Answer. As mentioned in an earlier answer, industry can assist CPSC in suggesting appropriate testing procedures, and advising the Commission of its own findings. CPSC, however, must still bear the responsibility under Section 6(b) for verifying the accuracy of information released.

**Question 5.** Should in-depth studies and investigations done by CPSC or by a qualified person or entity outside the Commission be presumed accurate for the purposes of disclosure?

Answer. What CPSC refers to as an in-depth investigation (IDI) is generally a telephone inquiry with no testing or examination of the product in question. An IDI conducted under these circumstances should not be presumed to be accurate. If CPSC amended its procedures, however, so that an IDI included a detailed investigation into the technical aspects of the allegation and reached a factually-based conclusion about causation, then it might be possible to give IDI's a presumption of accuracy.

For studies and investigations performed outside CPSC, it is difficult to establish criteria for who is a "qualified person or entity" deserving a presumption of accuracy. A person or organization may be qualified to give an expert opinion in one area but not another. For that reason, we believe that CPSC needs to evaluate outside studies and investigations internally, and not assume that they are accurate.

**Question 6.** If other health and safety agencies do not have 6(b) requirements, why should the CPSC?

Answer. Please refer to the answer to majority question #3.

**Question 7.** Please give your views on the five suggestions provided by Commissioner Statler in his testimony to amend Section 6(b).

Answer. Commissioner Statler's first suggestion is that Section 6(b) not apply to "positive" or "neutral" information, but only to "adverse" disclosures. The comment implies that drawing such distinctions is simple, when it is exceedingly difficult for a CPSC employee to determine what is "neutral" from the manufacturer's perspective. If CPSC rated products for safety and stated that a company made an "average" product, would that be "neutral"? In practice, firms will not object to "positive" or "neutral" statements, and CPSC should continue to give manufacturers the opportunity to comment before disclosure.

The second recommendation is that Section 6(b) not apply to dissenting opinions by Commissioners. Since dissents in adjudications are required to be published under the Freedom of Information Act, 5 U.S.C. § 552(a)(1), Commissioners have the opportunity to make their views known. If a Commissioner wishes to make statements beyond the dissenting opinion, then Section 6(b) should definitely apply. To do otherwise would in effect exempt Commissioners from the requirements of the law.

The third suggestion is to exempt information already in the public domain from Section 6(b) safeguards. Even with such information, however, CPSC can cause an unfair adverse impact to a company by selectively releasing unfavorable articles or references and not releasing favorable material. In addition, such an exemption would allow CPSC to distribute preliminary conclusions contained in newspaper articles which it knows in retrospect not to be correct. If CPSC wishes to avoid Section 6(b) problems with this sort of material, it can simply give the person requesting disclosure a list of references rather than the actual content.

Commissioner Statler's fourth recommendation is to exempt recall information from Section 6(b) protections. There is no support for the suggestion that CPSC and the company involved cannot get out vital information during a recall effort. Since the two are working closely together and have a mutual interest in distributing accurate information, there should be no Section 6(b) problem, particularly since CPSC can expedite disclosure regarding an imminent hazard. Once the recall is finished, Section 6(b) is needed to assure that correct information on its effectiveness is disseminated. Since the manufacturer keeps the records, it is appropriate for CPSC to allow the company to review the material describing the recall.

The fifth suggestion is that Section 6(b) not apply to repetitions of recall announcements. We read Section 6(b) to exclude this situation already, although other members of industry have evidently argued the contrary. In any case, if "the potential for tragedy is ever-present" as Commissioner Statler postulates, then CPSC would have the power to expedite disclosure under its imminent hazard powers.

As a final note, we agree with Commissioner Statler in placing a high value on the public's ability to make an "informed choice in buying and using consumer products". We believe that the Section 6(b) safeguards further that interest by assuring that consumers receive accurate information on which to base their decisions.

Thank you for the opportunity to respond to these questions. If we may be of further assistance, please do not hesitate to contact us.

Senator KASTEN. Mr. Engel, thank you very much.

The next witness is Mr. Martin Katz, who is the General Counsel for the Consumer Product Safety Commission. I guess you have taken over that chair permanently. You are just going to sit here all day.

Mr. KATZ. Good morning, Mr. Chairman. It is a pleasure being here.

This panel is focusing on the issues presented by section 6(b) of the Consumer Product Safety Act, one of the most controversial and complex sections of our statute. You heard earlier today the Commissioners' views on section 6(b). They have highlighted some of the issues of particular concern. I will now focus on the amendments the Commission has requested regarding the exemption of Freedom of Information Act requests from section 6(b).

At the outset I would like to point out an obvious fact, but one which is often obscured in the debate surrounding this provision. Section 6(b) is entitled "Public Disclosure of Information." The statutory mandate is the release of information, and not its withholding.

Complying with the 6(b) requirements have hamstrung the agency's ability to process Freedom of Information Act requests in a timely manner. Often the release of information is so dated because of the delay caused by 6(b) that the information is useless.

The Commission is convinced that the provisions of 6(b) are both unworkable and unwarranted. This conviction has led to its request, which I renew today, that the statute be amended. We have suggested two ways to accomplish this.

The preferred option is to amend 6(b) to provide that its requirements only apply to Commission initiated releases, such as press releases and fact sheets, and not to information disclosed in response to a Freedom of Information Act request. Amending the statute in this manner is entirely consistent with the principles of the Freedom of Information Act, and would remove many of the unnecessary barriers to disclosure we currently face.

If Freedom of Information Act requests are not excluded from the 6(b) requirements, we suggest that the statute be amended to provide that soliciting a manufacturer's or private labeler's comments and then including those comments, together with a statement explaining the nature of the information, satisfies the information disclosure requirements under our acts.

Importantly, in both of these options, the Commission would continue to take the reasonable steps required by section 6(b)(1), as well as the stringent internal clearance procedures mandated by section 6(b)(6). Thus every time the Commission initiates the release of information and gives its imprimatur to that information, these stringent requirements would be met.

The suggested amendments the Commission requests this subcommittee to consider today draw a distinction between the disclosure procedures required for information that is released solely for the purpose of responding to a Freedom of Information Act request and those required for information that the Commission, on its own, chooses to disseminate. We believe this distinction is critical to the resolution of the 6(b) controversy.

The section 6(b) requirements make more sense when the Commission disseminates information at its own initiative for the purpose of influencing public behavior with respect to particular consumer products. The critical factor in this situation is that the Commission places its weight and its official role behind the information and expects the public to rely on the dissemination in large measure because the Commission has made it. Under such circumstances, when the Commission in effect vouches for the accuracy of the information, the public as well as manufacturers and private labelers are entitled to expect that the Commission has a reasonable basis for its position.

A very different situation is presented when the Commission discloses information in response to a Freedom of Information Act request. Here the Commission neither initiates the disclosure nor gives its imprimatur to the information. The Commission is not marshalling its resources and expertise to collect safety information and it is not widely disseminating that information. It is not expressing an opinion regarding the meaning of the information nor endorsing any particular point of view.

In short, the Commission is not vouching for the credibility of the information. Its role in responding to a Freedom of Information Act request is essentially passive.

As you can see from the charts we have prepared, no other health and safety agency in our Federal Government is required to take any of the steps mandated by section 6(b) when they respond to Freedom of Information Act requests. Yet, the type of information which is in the Commission's files and which is the subject of our Freedom of Information Act requests is qualitatively no different than that collected and maintained by other health and safety agencies.

[The chart follows:]



## DISCLOSURE RESTRICTIONS ON HEALTH AND SAFETY AGENCIES

|                                                                                                                                                                                                      | EPA      | FTC      | FDA      | NHTSA   | OSHA    | CPSC     | USDA     | HUD     | FAA     | MSHA                   | NRC              |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|----------|----------|---------|---------|----------|----------|---------|---------|------------------------|------------------|
| (1) Restrictions on disclosing information that is trade secret or confidential business information (other than Exemption 4 of FOIA)?                                                               | Yes..... | Yes..... | Yes..... | No..... | No..... | Yes..... | Yes..... | No..... | No..... | No.....                | Yes              |
| (2) Restrictions on disclosure of information that a firm reports about a possible safety hazard (other than trade secret or confidential business information)?                                     | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | Yes <sup>1</sup> ..... | Yes <sup>1</sup> |
| (3) Required to notify a firm and give an opportunity to comment before disclosing information from which the firm can be identified (other than trade secret or confidential business information)? | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (4) Required to wait a specified period before disclosing information about the firm?                                                                                                                | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (5) Required to include the firm's comments with information being disclosed?                                                                                                                        | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (6) Required to take reasonable steps to assure the accuracy of information that identifies a firm before disclosing the information?                                                                | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (7) Required to notify the firm prior to disclosing information if firm claims that the information is inaccurate?                                                                                   | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (8) Required to take reasonable steps to assure that disclosure of information that identifies a firm is fair in the circumstances?                                                                  | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |
| (9) Required to take reasonable steps to assure that disclosure of information identifying a firm is reasonably related to effectuating statutory purposes?                                          | No.....  | No.....  | No.....  | No..... | No..... | Yes..... | No.....  | No..... | No..... | No.....                | No               |

<sup>1</sup> Agency may not disclose the identity of a person reporting suspected violation(s) of agency statute or regulations.

Mr. KATZ. Soil fertility analysis conducted by the Department of Agriculture, test results on a drug in the market performed by the Food and Drug Administration, a worker's complaint on unsafe conditions in his factory received by the Occupational Safety and Health Administration, and the investigation of a car defect conducted by the National Highway Traffic Safety Administration are routinely released by these agencies in response to Freedom of Information Act requests where no FOIA exemption applies.

In addition, to our knowledge none of these agencies has any statutory provision requiring the extensive clearance procedures for non-FOIA releases of information found in sections 6(b) (1) and 6(b)(6) or the retraction provision found in section 6(b)(7) of our statute.

One of the greatest fallacies in the 6(b) debate is the assumption that when the Commission responds to a Freedom of Information Act request the requestor will somehow perceive the Commission's response itself as an endorsement of the information. From this assumption flows the equally fallacious argument that the Commission is therefore bound to insure that the information is accurate so that a product's reputation is not unjustly damaged. These assumptions are simply incorrect and find no support in the Commission's past experience.

As you may recall, in the Supreme Court's decision in 1980 in *Consumer Product Safety Commission v. GTE Sylvania* the Commission did not interpret section 6(b) as applying to the information released under the Freedom of Information Act. During the 7 years between 1973 and 1980, the Commission provided documents to at least 50,000 Freedom of Information Act requestors. Numerous manufacturers and private labelers were identified in these documents. This 7-year experience demonstrates that in the context of Freedom of Information Act disclosures, there simply is no link between the Commission's release of product-specific information and damage to a firm's reputation.

Even if a link could be established, it still would not justify requiring the Commission to adhere to the 6(b) restrictions when responding to Freedom of Information Act requests. The very purpose of the Freedom of Information Act is to provide public access to information in the Government's possession. Government agencies are after all, public bodies. Exceptions to the sweeping disclosure provisions of the Freedom of Information Act are few and narrowly construed. Providing information under the Freedom of Information Act does not—and should not—hinge on who is requesting the information, on the type of information requested, on the use that may be made of the information, or even on whether the information is accurate or the disclosure fair.

The 6(b) requirements are an absolute abridgement of these principles. They contravene the very essence of open and accessible government. There is no rationale for requiring this agency alone, among the health and safety agencies, to adhere to these restrictive requirements.

The Supreme Court stated in *GTE Sylvania* that its decision rested on a strict interpretation of the plain language of the statute. The answer to the 6(b) problem, therefore, lies with the Congress and not the courts. If it is this committee's intent to prohibit

the Commission from releasing information under the Freedom of Information Act, then I respectfully suggest that our statute be amended to make it clear that the Commission is thus prohibited. If this is not the committee's intent, then I cannot stress strongly enough that section 6(b) should be amended along the lines I have suggested here today.

In my view, neither logic nor fact supports any other course of action. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF MARTIN HOWARD KATZ, GENERAL COUNSEL, CONSUMER PRODUCT SAFETY COMMISSION

Good morning. My name is Martin Howard Katz. I am the General Counsel of the Consumer Product Safety Commission.

This panel is focusing on issues presented by section 6(b) of the Consumer Product Safety Act, one of the most controversial and complex sections of our statute. You heard earlier today the Commissioner's views on section 6(b). They have highlighted some of the issues which are of particular concern. I will now focus on the amendments the Commission has requested regarding exemption of Freedom of Information Act requests from section 6(b).

At the outset, I would like to point out an obvious fact, but one which is often obscured in the debate surrounding this provision; section 6 is entitled "Public Disclosure of Information." The statutory mandate set forth in this section is the release of information and not its withholding.

There is a serious conflict, however, between the clear directive of this and other sections of the Consumer Product Safety Act—public disclosure—and the very real barriers to disclosure that the provisions of section 6(b) erect. The barriers I refer to of course, are the requirements that the Commissioner notify the manufacturer or private labeler, solicit their comments, and take reasonable steps to assure the information is accurate, the disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the Act before it releases any product-specific information. Complying with these requirements has hamstrung the agency's ability to process Freedom of Information Act requests in a timely manner.

The Commission is convinced that the provisions of section 6(b) are both unworkable and unwarranted. This conviction has led to its request, which I renew today, that the statute be amended. We have suggested two ways to accomplish this.

The preferred option is to amend section 6(b) to provide that its requirements only apply to Commission initiated releases such as press releases and fact sheets and not to information disclosed in response to a Freedom of Information Act request. Amending the statute in this manner is entirely consistent with the principles of the Freedom of Information Act and would remove many of the unnecessary barriers to disclosure we currently face.

If Freedom of Information Act requests are not excluded from the 6(b) requirements, we suggest that the statute be amended to provide that soliciting a manufacturer's or private labeler's comments and then including those comments, together with a statement explaining the nature of the information, satisfies the information disclosure requirements under our Acts.

Importantly, in both of these options, the Commission would continue to take the reasonable steps required by section 6(b)(1), as well as the stringent internal clearance procedures mandated by section 6(b)(6), every time it initiated the release of information. Thus, amendment of the statute along either of these lines would not disturb the safeguards afforded firms by the current provisions of section 6(b), where the Commission sanctions the release and gives its "imprimatur" to the information. In these cases, we would continue to take reasonable steps to assure accuracy, fairness and effectuation of the purposes of the Acts.

Amendment of the statute along either of these lines would also help alleviate the resource burden section 6(b) imposes on the agency.

In fiscal year 1982 alone, the Commission received approximately 10,000 Freedom of Information Act requests. Only 8,000 requests were processed in calendar year 1982. Despite our best efforts, these requests are rarely processed within the 10 day limit prescribed by the Freedom of Information Act. Additionally, as of January 1, 1983, the Commission had a backlog of approximately 3,000 Freedom of Information Act requests. At least 800 of these involved section 6(b).



Complying with the requirements of section 6(b) has also significantly drained the agency's resources. As you know, the Commission's budget for fiscal year 1982 was \$32.164 million.

At least \$1.5 million, was spent on responding to all information requests, including Freedom of Information Act and non-Freedom of Information Act requests. This does not include the cost of developing television and radio public service announcements, press releases and fact sheets. Of this \$1.5 million, \$485,000, or nearly one-third, was spent on complying with the requirements of section 6(b). This is a very conservative estimate. Additionally, we estimate that in the Office of the Secretary and the Office of the General Counsel alone, an average of 31.7 staff hours are required to process one Freedom of Information Act request if product specific information is involved. Only an average of 2.3 staff hours are required if the request does not seek information that identifies a manufacturer or private labeler. These figures do not include the staff time required to gather the documents responsive to the request from the various Commission offices.

The suggested amendments the Commission requests this Committee to consider today, draw a distinction between the disclosure procedures required for information that is released solely for the purpose of responding to a Freedom of Information Act request and those required for information that the Commission, on its own, chooses to disseminate. We believe this distinction is critical to the resolution of the section 6(b) controversy.

On the whole, the Commission does not dispute that when it initiates the widespread public dissemination of information it has a responsibility to take steps to assure that the information is accurate and the disclosure fair. This responsibility exists even in the absence of specific statutory requirements.

The section 6(b) requirements make more sense when the Commission disseminates information, at its own initiative, for the purpose of influencing public behavior with respect to particular consumer products. Educating the public is one of the Commission's major functions under the Act. Before lending its authority to a public announcement of product information, the Commission should make a responsible effort to assure that the information is accurate. The critical factor in such a situation is that the Commission places its weight and official role behind the information and expects the public to rely on the dissemination, in large measure because the Commission has made it. Under such circumstances, when the Commission in effect vouches for the accuracy of the information, the public is entitled to expect that the Commission has a reasonable basis for its position and, by the same token, manufacturers and private labelers have a right to expect that information about their products is reasonably accurate and not unfairly disparaging. Section 6(b)(1) is intended to address these concerns and it has proven effective in doing this.

A very different situation is presented when the Commission discloses information in response to a Freedom of Information Act request. Here, the Commission neither initiates the disclosure nor gives its imprimatur to the information. The Commission is not marshalling its resources and expertise to collect safety information and it is not widely disseminating that information. It is not expressing an opinion regarding the meaning of the information or endorsing any particular point of view.

In short, the Commission is not vouching for the credibility of the information. Its role in responding to a Freedom of Information Act request is essentially passive. Like every other federal agency that is subject to the Freedom of Information Act, the Commission determines whether it possesses responsive documents and, if so, it produces them if there is no applicable exemption.

Not surprisingly, no other health and safety agency is required to take any of the steps mandated by section 6(b) when they respond to Freedom of Information Act requests. Yet the type of information which is in the Commission's files and which is the subject of our Freedom of Information Act requests is qualitatively no different than that collected and maintained by other health and safety agencies. Soil fertility analysis conducted by the Department of Agriculture, test results on a drug in the market performed by the Food and Drug Administration, a worker's complaint on unsafe conditions in his factory received by the Occupational Safety and Health Administration and the investigation of a car defect conducted by the National Highway Traffic Safety Administration, are routinely released by these agencies in response to Freedom of Information Act requests where no Freedom of Information Act exemption applies. In addition, to our knowledge, none of these agencies has any statutory provision requiring the extensive clearance procedures for non-Freedom of Information Act releases of information found in sections 6(b) (1) and (6) or the retraction provision found in section 6(b)(7). As you can see from the chart we have prepared, our survey of the health and safety agencies shows that except for

trade secret and confidential information restrictions, none of the agencies have procedures similar to those found in section 6(b).

One of the greatest fallacies in the 6(b) debate is the assumption that when the Commission responds to a Freedom of Information Act request, the requestor will somehow perceive the Commission's response itself as an endorsement of the information. From this assumption flows the equally fallacious argument that the Commission is therefore bound to assure that the information is accurate so that a product's reputation is not unjustly damaged. These assumptions simply are incorrect and find no support in the Commission's past experience.

As you may recall until the Supreme Court's decision in 1980 in *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980), the Commission did not interpret section 6(b) as applying to information released pursuant to the Freedom of Information Act. During the seven years between 1973 and 1980, the Commission provided documents to at least 50,000 Freedom of Information Act requestors. Numerous manufacturers and private labelers were identified in these documents.

Apart from the *GTE Sylvania* suit, the Commission was only sued once during this seven year period to enjoin the disclosure of documents under the Freedom of Information Act. The Commission prevailed in this case. Certainly, manufacturers or private labelers would have invoked a legal remedy if the release of Freedom of Information Act information was as damaging to their product's reputation as they now claim. Equally revealing, not one firm asked for a retraction of information disclosed under the Freedom of Information Act.

This seven year experience demonstrates that in the context of Freedom of Information Act disclosures there simply is no link between the Commission's release of product-specific information and damage to a firm's reputation. Even if a link could be established however, it still would not justify requiring the Commission to adhere to the 6(b) restrictions when responding to Freedom of Information Act requests.

The very purpose of the Freedom of Information Act is to provide public access to information in the government's possession. Government agencies are, after all, public bodies. Exceptions to the sweeping disclosure provisions of the Freedom of Information Act are few and narrowly construed. Providing information under the Freedom of Information Act does not—and should not—hinge on who is requesting the information, on the type of information requested, on the use that may be made of the information, or even on whether the information is accurate, or the disclosure fair. A Freedom of Information Act disclosure entails no statement concerning the conclusions that can or should be drawn from the information released.

The section 6(b) requirements are an absolute abridgement of these Freedom of Information Act principles. They contravene the very essence of open and accessible government. There is no rationale for requiring this agency alone, among the health and safety agencies, to adhere to these restrictive requirements.

Indeed, in a time when the role of the federal government is being limited, Section 6(b) represents an unnecessary intrusion into the activities of the private sector. The 6(b) reasonable steps requirements ensure that all information released by this agency, bears the Commission's seal of approval. Information that otherwise may be discounted or discredited now must overcome our imprimatur. This effect is completely at odds with the "marketplace" philosophy which looks to competing interests and the judicial system to resolve disputes or credibility.

The Supreme Court stated in its opinion in *GTE Sylvania* that its decision rested on a strict interpretation of the plain language of the statute. The answer to the section 6(b) problem, therefore, lies with Congress and to the courts. If it is the Committee's intent to prohibit the Commission from releasing information under the Freedom of Information Act, then I respectfully suggest that our statute be amended to make it clear that the Commission is thus prohibited.

If this is not the Committee's intent, then I cannot stress strongly enough that section 6(b) should be amended along the lines I have suggested here today. In my view, neither logic nor fact supports any other course of action.

Thank you.

[The following information was subsequently received for the record:]

#### QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

**Question 1.** In January 1983 you had 3,000 FOIA requests with 800 of these involving section 6(b). Do you believe that the 6(b) "reasonable steps" requirement is the sole reason for the agency backlog in light of the fact that 2,200 of these requests did not involve section 6(b)? What other factors have resulted in delay?

**Answer.** It is our view that the "reasonable steps" requirement of section 6(b) is a primary reason for the agency backlog in processing FOIA requests. While only approximately 25 percent of the backlogged requests involve processing documents under section 6(b) of the CPSA, such processing is extremely time consuming and draining on the resources devoted to processing all FOIA requests. A request involving section 6(b) typically requires ten to fifteen times the staff effort to process as do other FOIA requests.

Section 6(b) requires that, prior to release of materials that identify manufacturers or private labelers of consumer products, the Commission must notify those firms of the intended disclosure. We must then review and process any comments from the firms regarding the accuracy of the information or objections to the disclosure. In addition, we must take reasonable steps to assure that the information to be disclosed is accurate, that the release is fair in the circumstances, and that the release effectuates the purposes of the acts that the Commission administers. While the staff spends time processing FOIA requests involving section 6(b), other requests must await their turn for processing. We estimate that it requires an average of 31.7 staff hours to process FOIA requests involving section 6(b). In contrast, it requires an average of 2.3 staff hours to process non-section 6(b) FOIA requests. These figures reflect processing time spent only by the Office of the Secretary and the Office of the General Counsel once documents responsive to the FOIA request are collected. (In 1982, an additional 4,500 requests for non-product specific information were processed by the Commission's National Injury Information Clearinghouse in a short time equivalent to the average 2.3 staff hours spent by the Office of the Secretary). In fiscal year 1982, the Commission processed 400 FOIA requests involving section 6(b) and 7,600 other requests.

In addition to the "reasonable steps" requirements, there are other factors that have contributed to the delay in processing FOIA requests.

While the number of FOIA requests received has remained constant (approximately 10,000 requests per year), the number of staff in the Freedom of Information Office and the National Injury Information Clearinghouse devoted to processing those requests has been reduced as a result of overall agency reductions. Other offices and directorates that must search files and provide documents responsive to certain requests have also suffered staff reductions resulting in additional delay.

Of the approximately 3,000 backlogged requests in the Freedom of Information Office, 1,200 are seeking a package concerning urea-formaldehyde foam insulation test methods and devices. This portion of the backlog is being eliminated by a mass mailing taking place at the present time.

**Question 2.** Will the implementation of the regulations create further delay? Please set out required procedures under the proposed regulation and the statute and estimate the time required for each procedure or requirement for the following categories of information: consumer complaints; CPSC in-depth investigations; staff work including testing and CPSC reviewed reports by contractors.

**Answer.** Implementation of the section 6(b) interpretative regulation will not create delay in the processing of information requests made under the Freedom of Information Act. We anticipate that issuance of the final interpretive regulation will have the opposite result—a small decrease in the processing time.

Section 6(b) requires the Commission to take "reasonable steps" to assure that information the Commission intends to disclose is accurate, that disclosure is fair in the circumstances, and that disclosure is reasonably related to effectuating the purposes of the act the Commission administers. The Commission must take these "reasonable steps" before disclosing information from which the public can readily ascertain the identity of a manufacturer or private labeler of a consumer product. In addition, section 6(b)(1) requires the Commission to provide an identifiable manufacturer or private labeler with notice of, and an opportunity to comment on, the intended disclosure not less than 30 days before the disclosure. The Commission must take the requisite reasonable steps irrespective of whether the firm submits comments when given the opportunity to do so.

At present, we can only speculate on processing time under the regulation because the regulation is not yet final and we lack sufficient experience in operating under the procedures. However, we anticipate that the section 6(b) interpretive rule will encourage firms to provide specific objections to the release of information. With specific objections, the Commission can make faster and better informed decisions about whether to disclose, withhold, or revise the information. In addition, the interpretive rule sets out Commission policy and procedures relating to release and retraction of information. Firms know what to expect, and the staff knows the procedures to follow. In our experience, this will help to reduce processing time and expense.



The statute does not define "reasonable steps." Therefore, based on its experience, the Commission has developed procedures that, in its opinion, are "reasonable steps" to assure that the information is accurate, to assure that disclosure is fair in the circumstances, and to assure that disclosure is reasonably related to effectuating the purposes of the statutes the Commission administers. The Commission published these procedures and policy statements in a proposed interpretive regulations published for public comment in the *Federal Register* of November 5, 1982.

As the regulation is interpretive, the Commission is already generally operating under the procedures outlined in the proposed regulation. Although our experience has been limited, we have found that the procedures in the proposed regulation work as the required "reasonable steps."

The Commission has determined that the following are reasonable steps to assure the accuracy of information it proposes to disclose: (1) Commission staff or a qualified person or entity outside the Commission (e.g., fire inspector, doctor, engineer) conducts an investigation or inspection that yields or corroborates the product information to be disclosed (for example, Commission investigator conducts in-depth investigation into a reported incident); (2) the Commission staff or a person or entity outside the Commission conducts a technical, scientific, or other evaluation that yields or corroborates the product information to be disclosed (for example, Commission engineer examines and analyzes a product allegedly involved in an incident); or (3) the person who submitted the information reviews and, if necessary, corrects the product information, confirms the information as accurate to the best of his/her knowledge and belief, and is in one of five enumerated groups (e.g., the injured person, an eyewitness to the incident, the parent or guardian of the child involved in the incident).

In addition to these reasonable steps, the Commission reviews all information to be sure it is accurate on face value (e.g., there are no obvious inconsistencies or obvious inaccuracies). The Commission provides the information to the identified manufacturer or private labeler for comment and, if the firm comments, considers these comments. (To assist the Commission in this analysis, the proposed rule provides that a firm's submission must be specific and accompanied by documentation—e.g., test results—where available.)

The Commission has determined that the following are reasonable steps to assure that disclosure of the information is fair in the circumstances; (1) the Commission accompanies the information disclosed with the firm's comments (or a summary of the comments) unless the firm asks that its comments not be released; (2) the Commission generally accompanies the disclosure of information with an explanatory statement that puts the information in context and makes the nature of the information clear to the recipients; (3) when practicable, the Commission releases other relevant information to help the recipient understand the information disclosed (for example, the Commission may disclose passing and failing test results where necessary to ensure complete understanding of the test results); (4) the Commission limits the form of disclosure to what is appropriate in the circumstances (for example, the Commission may issue a regional press release rather than a national one under some circumstances); and (5) the Commission may delay disclosure of information in some circumstances (for example, the Commission may not release information until an investigation is concluded, rather than disclosing the information piecemeal).

The Commission has determined that the following are reasonable steps to assure that the information disclosure is reasonably related to effectuating the purposes of the acts the Commission administers. The Commission considers (1) the specific and general purposes of the acts as found in the statutes and their legislative histories; (2) the general right of the public to have access to information that reveals whether the Commission is meeting its statutory responsibilities and to information upon which the Commission bases a decision that affects the public health and safety; and (3) the general impact of release of the information on the public and on affected members of industry. The Commission considers any comments the firm has provided on this issue.

If the firm comments on the issue of whether release of the information reasonably effectuates the purposes of the statutes, the Commission considers the firm's comments in its deliberations on this issue.

As a general matter, implementing the proposed regulation will not significantly reduce the time necessary to process FOIA request because of the statutory requirements that a firm have an opportunity to comment, that the Commission take "reasonable steps," and that a firm be given additional written notice if the Commission decides to release information over the firm's objections as to the accuracy of the information. These are built-in delays over which the Commission has no control. In addition, there are the delays inherent in the Freedom of Information Office due to

recent personnel and budget cuts, cuts that have also reduced the number of people available to identify and to collect responsive documents located throughout the Commission. Finally, there are the delays caused by the complexity of the documents requested. Often, several firms are identified in documents responsive to one request. Each manufacturer or private labeler must receive individual notice, tailored specifically to it. None of the information can be disclosed until all comments are received and analyzed. Again, no internal Commission procedure can address this factor.

However, as mentioned above, we believe that some reduction in processing time will result from the procedures in the regulation. The Commission is building into its procedures the "reasonable steps" required by section 6(b) and tightening those procedures already in place. Thus, for example, the Commission has an internal review and clearance procedure for materials submitted under contract. We are of the opinion that this internal clearance procedure (which includes review, discussion about the draft report with the contractor, and careful monitoring during the development period) is a "reasonable step" to assure the accuracy of the information contained in the report. This procedure is already in place so implementation is not an issue. However, whether a report is technically accurate addresses only one section 6(b) criterion; the Commission must still take the requisite "reasonable steps" with respect to the other two criteria.

Each document that must be examined in light of section 6(b) potentially presents an individual circumstance that must be addressed on a case-by-case basis. Therefore, while the Commission's proposed regulation will provide general guidance to staff and affected members of industry, it cannot greatly reduce the processing time under section 6(b).

*Question 3.* Has the absence of a regulation implementing section 6(b) resulted in delay and inefficiency?

*Answer.* The absence of a regulation implementing section 6(b) has resulted in some delay and inefficiency in processing documents under FOIA that are subject to section 6(b). Delay in issuing a regulation, however, was due in part to the need for the Commission to gain experience in applying section 6(b) to FOIA requests. As you know, before the U.S. Supreme Court's decision in June 1980, the Commission interpreted section 6(b) as not applying to FOIA requests.

Following the Supreme Court's decision, the Commission analyzed section 6(b)'s application to FOIA requests, in light of the court's decision, to determine its impact on Commission operations. During this period of analysis, the Commission gained invaluable experience in the across-the-board application of section 6(b) mandated by the Supreme Court.

While the Commission was considering a draft regulation in 1981, it became clear that section 6(b) would be amended during the Commission's reauthorization process. Therefore, the Commission decided to wait before proposing a regulation under section 6(b).

The 1981 amendments to the CPSC meant further study by the Commission to assess the impact of the amendments and to develop policies and procedures consistent with the amendments. After several public meetings to discuss a 6(b) rule, including meetings with industry and consumer organization representatives, the Commission published its proposed rule on November 5, 1982.

We estimate that the proposed section 6(b) interpretive rule may reduce the time (and thus the expense) necessary to process FOIA requests involving section 6(b) but will do little to reduce other section 6(b)-related expenses.

We anticipate that the section 6(b) interpretive rule will encourage firms to provide specific objections to the release of information. With specific objections the Commission can better assess the information and make faster and better informed decisions about whether to disclose, to withhold, or to revise the information. In addition, the interpretive rule sets out Commission policy and procedures relating to release and retraction of information. Firms know what to expect, and the staff knows the procedures to follow. This will reduce processing time and expense.

*Question 4.* Since the CPSC has received additional helpful information from consumers responding to the pilot consumer complaint verification program, do you believe this procedure should continue even if you were not required to apply section 6(b) to FOIA requests? Will this procedure result in additional delay in the processing of FOIA requests if section 6(b) remains applicable? What is the cost of this verification process?

*Answer.* During the first week of February, the Commission's Office of the General Counsel, as part of a pilot program, sent approximately 620 complaints, (500 by telephone and 120 written) received during December and January, back to the complainant for confirmation. As of February 28, 1983, 320 of the 620 complaints had

been confirmed. Over 85 percent of the responses included corrections (for the most part minor, e.g., corrections of spelling, filling in blanks) and additions, such as brand names and model numbers, omitted from the original complaint.

In general, the rate of response and the comments included in the confirmations indicate a very favorable consumer reaction to the confirmation process, and the corrections made and details added provide the Commission with more accurate information.

The staff is analyzing the results of the pilot program and will likely recommend to the Commission that the consumer confirmation process continue even if the Commission is not required to apply section 6(b) to FOIA requests. We anticipate the request for confirmation will be sent out upon receipt of the complaint. Our experience during the pilot program has been that the vast majority of confirmed complaints were returned within two weeks of being sent for confirmation. The only time delay might result when the Commission receives a FOIA request at the same time it sends a complaint out for confirmation or if a request for confirmation is pending.

The Commission's Directorate for Epidemiology indicated to the Commission during briefing on the proposed rule that it would need no additional resources to implement the consumer confirmation process. Accordingly, the cost to the Commission will be minimal.

**Question 5.** Do other health and safety agencies routinely receive and disseminate consumer complaints through the FOIA?

**Answer.** To the best of the Commission's knowledge, other health and safety agencies routinely receive and disseminate consumer complaints under FOIA. The Commission staff conducted a survey of ten (10) other health and safety agencies (EPA, OSHA, FTC, NHTSA, FDA, FAA, MSHA, HUD, USDA, and NRC), and learned that those agencies have no restrictions on disclosure of information under FOIA similar to those imposed on the Commission by section 6(b).

**Question 6.** Mr. Ralph Engel, representing the Chemical Specialties Manufacturer's Association, states in his testimony that the CPSC's rule proposal sidesteps the statutory provisions of Section 6(b). (See pages 3, 4, and 5). Please briefly discuss each statutory requirement and rule proposal that he addresses. Also please restate Mr. Engel's argument in each case. For example, is the proposed 6(b) rule in conflict with Section 6(b)(4) of the Act as to the time for application of Section 6(b) requirements?

**Answer.** As a preliminary matter to a discussion of Mr. Engel's testimony, on behalf of the Chemical Specialties Manufacturer's Association, the Commission would note that the provisions of the proposed section 6(b) rule to which CSMA objects were published in the FEDERAL REGISTER to elicit comments. The Commission is currently assessing the comments it received in response to the proposed rule to determine whether and to what extent changes to the rule are appropriate. The eight specific objections raised in the CSMA testimony are discussed in detail below. The discussion represents the current thinking of the Commission staff and is subject to further review and analysis by the Commission.

#### PETITIONS

Section 6(b)(4) contains specific exemptions for information disclosed in various types of administrative or judicial proceedings. Thus, information in the course of or concerning a rule making or an adjudicatory proceeding, or in the course of other administrative or judicial proceedings under the act is expressly exempted from section 6(b). The Commission's proposed rule identified as one of the "other administrative proceedings" a proceeding to act on a petition to start a rulemaking proceeding. The Commission's rule pointed out that such a proceeding began with the filing of a petition and ended when the petition was denied or, if granted, when the rulemaking proceeding began. CSMA claims first, that this construction of the statute creates a new exemption from the Section 6(b) protections and second that it would, in effect, nullify all safeguards established by section 6(b). Under the CSMA theory, an individual could simply file a petition, possibly frivolous in nature, and then make a Freedom of Information Act request for all documents relevant to the petition. Under CSMA's interpretation of the statute, Section 6(b) would not apply because the petition had been filed, and all such documents would be releasable.

CSMA has misconstrued both the statute and the intention of the Commission in publishing this procedure. The legislative history of the 1981 amendments to section 6(b) expressly identified proceedings to grant or deny a petition as one of the "other administrative proceedings" which would be expressly exempted from section 6(b)(1) of the CPSA. Omnibus Reconciliation Act, P.L. 97-35, Conference Report No. 208,



97th, Cong, 1st Sess., 879. Thus, there is a statutory basis for the exception to Section 6(b) for petitions. Further, the exemption is not intended to create a sweeping loophole to the 6(b) safeguards. Rather the scope of the exemption was patterned after that of the exemption concerning formal rulemaking. Thus, just as formal rulemaking begins with the publication of an advanced notice of proposed rulemaking, so a petition proceedings begins with receipt of a petition. At the time of the initiation of a petition proceeding, the only information which would be available under the Freedom of Information Act would be the petition itself and any supporting materials submitted by the petitioner. Internal staff documents or other materials in the Commission's file would not be construed as being documents relating to the petition proceeding and thus would not be exempt from Section 6(b) until such time as the staff had prepared the briefing package and had included or referenced those documents in the briefing paper. This, of course, is similar to the procedure the Commission now follows with respect to rulemaking. Thus, rather than being a voluminous exception to section 6(b), the exception for petition proceedings is in reality a very narrow one which closely tracks the exception for rulemaking.

#### CONSUMER CONFIRMATION

Section 6(b) of the CPSA requires the Commission to take reasonable steps to assure the accuracy of information concerning a product when, the public could readily ascertain the identity of the manufacture of the product in question from the information. One category of information which might be subject to the requirements of section 6(b) is consumer complaints. While the Commission often conducts indepth investigations of consumer complaints, there are many instances in which the complaint is simply not of sufficient importance to the Commission to justify performing such a detailed investigation. The Commissioner does, however, maintain such complaints in its files.

In the proposed rule, the agency proposed the following procedure as one of the reasonable steps to assure the accuracy of such complaints. The Commission, upon receipt of the complaint, would return it to the complainant with a request that he or she read the complaint, review it, if necessary correct the information in the complaint, and confirm the information as accurate to the best of the complainant's knowledge and belief. The Commission also required that such a confirmation could only be made by a person with first hand knowledge of the information contained in the complaint such as a person injured or nearly injured in an incident involving a product, an eyewitness to an injury or safety related incident or an individual with the requisite training or experience who has investigated or determined the cause of deaths, injuries or safety related incidents, or a person, who in the basis of his or her own observation or experience, identified an alleged safety related problem in a product even through no incident or injury may have occurred.

CSMA objected to this proposal as being inadequate to meet the statutory requirements. CSMA claims that the Commission's intention is to confirm that the complainant has made a statement, and not to confirm the accuracy of the information contained in that statement. The CSMA interpretation neglects three critical points. First, CSMA assumes that all consumer complaints identify defects which require technical expertise to be properly analyzed. This is incorrect. Most consumer complaints concern incidents or observations rather than defects. Consumer describe events that they have witnessed or experienced. This then is the substance of most consumer complaints. Complaints often say nothing about the existence of a defect in a product and do not attribute the product related incident to any specific cause. When a defect or cause is identified, it is normally of a simple nature which is quite capable of verification by the consumer. For example, the consumer may write that her child pulled the nose off a stuffed donkey and a sharp wire protruded. This observation does not require any specialized expertise.

More importantly, however, is the fact the the person most qualified to talk about an incident is the person who experienced or witnessed it. The confirmation process simply parallels taking a statement from such a person. The fact that a complaint does not specifically identify a defect or is not supported by an in-depth investigation or an engineering analysis does not mean that the incident did not occur or that the consumer is wrong. In the absence of that type of information the complaint simply stands for what it purports to be a report of an incident and not a statement of the cause of the incident or the presence or absence of a defect.

CSMA erroneously assumes that, once the Commission receives confirmation of a complaint, the Commission will automatically release the information in the complaint without further review. This view, of course, ignores a second provision of the proposed section 6(b) rule which states that the Commission will undertake the inde-

pendently review for accuracy all the information it proposes to disclose. Thus, all consumer complaints which are the subject of a proposed information disclosure will be reviewed in light of the manufacturer's Section 6(b) comments to determine whether the Commission has taken reasonable steps to assure accuracy. In the absence of such comments, each complaint will still be reviewed to assure that 1) the consumer's observations are based on first hand knowledge, 2) on its face, there is nothing in the complaint which would call into question its accuracy, and 3) if the complaint includes statements concerning defects or causes of incidents that the consumer is qualified to make observations. If a complaint or a portion of a complaint fails to meet any one of these three tests, it is not disclosed. For example, if the consumer lacks the appropriate qualifications to make a statement about a defect the Commission will not release that statement, notwithstanding the fact that the consumer has confirmed it.

Finally, CSMA ignores probably the most salient point of the disclosure process. In providing manufacturers the opportunity to comment on proposed information disclosure, Congress contemplated a partnership between industry and the Commission in assuring that such disclosures are accurate. In the preamble to the proposed rule, the Commission noted that it routinely plans to send consumer complaints to manufacturers upon receipt to enable the manufacturers to investigate or take whatever followup they regard as appropriate. This process is already taking place. Thus, at the time manufacturers receive notice under 6(b)(1) that a complaint is the subject of proposed information disclosure, the manufacturer will, if it elects to do so, be able to furnish meaningful comments as to the accuracy of the complaint and to provide specific data and information demonstrating why the Commission should not release a particular document. As noted before, even if the manufacturer fails to comment, the Commission will still undertake an independent analysis of the information prior to disclosure.

#### INADVERTENT DISCLOSURE

Section 6(b)(1) of the CPSA requires advance notice of manufacturers of proposed information disclosures only "to the extent practicable." Section 1101.26 of the proposed rule contains examples of instances in which advance notification might not be practicable. Among these was an example concerning the inadvertent disclosure of information during an oral discussion during Commission meetings or meetings with outside parties, where for the substance of the discussion could not be predicted in advance. CSMA listed this as an example of an attempt to sidestep the statutory safeguards of section 6(b). CSMA has misconstrued the scope of this example and of the intention of the Commission in proposing it.

The Commission recognizes that section 6(b) applies to oral as well as written disclosures. Accordingly, as a general principle, the Commission attempts to comply with the requirements of section 6(b) insofar as discussions of information concerning specific manufacturers take place in Commission meetings or in meetings with outside parties. There are two methods to assure this safeguard. First, the Commission has the option to close a public meeting when it wishes to discuss such information and to bar all non-Commission employees from the proceedings for the duration of that discussion. While the Commission feels that this may be contrary to the general principle of openness in government and even may result in members of industry being removed from discussions of interest to them, it recognizes that the statutory requirements of section 6(b) may nonetheless require closing a meeting. Similarly, advance briefing of the Commissioners prior to a Commission meeting or of the staff prior to a meeting with outside parties may well resolve potential 6(b) issues prior to the meeting. Thus, the Commission fully intends to implement the Section 6(b) statutory safeguards for oral disclosure *insofar as it is practicable*. There may be rare circumstances in which, during the course of the speech and debate of the Commissioners or discussions with the staff, manufacturer-specific information is disclosed without prior notification. This is the situation which the exception for inadvertent disclosure is designed to address.

#### DISCLOSURE OF GENERIC INFORMATION

The statutory provisions of section 6(b) only apply when the Commission proposes to publicly disclose information from which the identity of the manufacturer can be readily ascertained. The proposed rule undertook in section 1101.13 to give two examples of information from which the Commission believed the public might not be able to readily ascertain the identity of a manufacturer. Both examples were intended to cover examples where the information to be disclosed, on its face, did not designate or describe the product in a manner in which the manufacturer could be

readily ascertained. The Commission recognized, however, that, if such information related to a generic product manufactured by relatively few manufacturers, there might be a possibility a manufacturer could identify the information as relating to a product produced by a competitor. Similarly, the Commission recognized that while there is no way to ascertain when research could be used to identify a product manufacturer from generic information, that possibility exists on occasion.

CSMA objects to the two examples, claiming that they are not permissible exceptions to 6(b). The basic premise of CSMA's argument is the assumption that the information in question would enable the Commission itself to identify a manufacturer. Because of this assumption, CSMA views the examples as an attempt to subjectively limit the applicability of section 6(b). This was not the intent of the Commission. If, from the manner in which the product is described or designated, the Commission staff is able to identify a manufacturer of a product, the staff will comply with section 6(b). If the staff is unable to identify the manufacturer, obviously there is no practical way in which the staff could comply with the requirements of the statute. The Commission anticipates however, because of the confusion associated with these examples, that they will be deleted or clarified in the final rule.

#### SECTION 15 SUBSTANTIAL PRODUCT HAZARD REPORTS

Section 6(b)(5) of the CPSA imposes an additional requirement to the section 6(b)(1) procedures. Section 15(b) of the CPSA imposes a requirement on manufacturers of consumer products that they immediately report to the Commission any information which reasonably supports the conclusion that any product they manufacture contains a defect which could create a substantial product hazard. Section 6(b)(5) prohibits the Commission from disclosing to the public information submitted pursuant to section 15(b) of the CPSA unless, *inter alia* the Commission had issued a complaint against the manufacturer of the product or has accepted in writing a remedial settlement agreement concerning the product. The proposed rule was drafted to reflect these statutory requirements.

CSMA objects to the proposed rule because it does not also apply to information independently obtained by the CPSC staff concerning a product about which a manufacturer has filed a section 15(b) report. CSMA hypothesizes that, in some instances, the manufacturer's report may "allow the agency to obtain the information" and thus believes that the Section 6(b)(5) safeguard should extend to all information concerning a product which is the subject of a Section 15(b) report.

CSMA points to nothing in the statute or legislative history which would support the contention that all information regarding a potential substantial product hazard should be withheld under section 6(b)(5) of the CPSA. The plain language of the statute indicates that section is only applicable to information submitted by the manufacturer. More importantly, however, CSMA gives no example of a situation in which a manufacturer's report would allow the Commission to obtain the information in a manner which would justify treating the information as part of the manufacturer's section 15(b) submission. Absent a specific example, the Commission is unable to determine under what circumstances, if any, it would revoke the section 6(b)(5) exception for information collected independently by its staff.

#### PRODUCTS OVER WHICH THE COMMISSION LACKS JURISDICTION

Section 6(b) of the CPSA applies specifically to information pertaining to a consumer product if the manner in which the consumer product is designated would permit the public to ascertain readily the identity of the manufacturer. Because section 6(b) applies only to consumer products, the Commission's proposed rule at section 1101.11 stated that the information which is the subject of the proposed disclosure must pertain to a product subject to the jurisdiction of the Commission under one or more of the statutes it administers. CSMA objects to this provision on the grounds that it is designed to permit the Commission to release information about products over which it has no jurisdiction without complying with section 6(b).

The proposed rule is simply designed to implement section 6(b). The text of Section 6(b) deals solely with consumer products. The rule therefore deals solely with consumer products. However, as a practical matter, the Commission intends to give section 6(b)(1) notice in every instance in which a manufacturer of a product can be readily ascertained, regardless of whether the product falls within the Commission's jurisdiction.



## DISCLOSURE OF SUMMARY OF A MANUFACTURER'S COMMENTS

Section 6(b)(1) gives the Commission the discretion, in disclosing information, to release any comments or other information or a summary thereof submitted by a manufacturer or a private labeler pursuant to section 6(b). Section 1101.21(b)(4) of the proposed rule states that when manufacturers, were given the opportunity to comment on information, they would also be notified that, upon disclosure of the information the Commission would release the firm's comments (or a summary thereof) to the public unless the manufacturer requested that the comments not be released. The proposed rule makes no reference to whether the Commission or the manufacturer would prepare the summary. CSMA objects to this provision of the rule on the grounds that section 6(b)(1) requires that any summary be prepared by the manufacturer. The CSMA opinion is one interpretation of the statute. The Commission notes that, even if the Commission does have the authority to prepare such summaries, it appears to be much more practical to permit the manufacturer to prepare the summaries itself rather than using the time and resources of the agency.

## TIME FOR COMMENT

Section 6(b)(1) requires the Commission, not less than 30 days prior to the disclosure of information to give manufacturers the opportunity to comment on the information. The proposed rule gives manufacturers 15 days from the date of the Commission's transmittal of the information to provide comments to the Commission.

The proposal also provides liberal provisions for extensions of time to comment. CSMA objected to this provision, apparently because it believes the 15 day time period is insufficient to permit comment, and also because it contends that the statute itself requires a 30 day comment period.

The statute is clear that the 30 day period is a restriction only on disclosure and is not the minimum period for an opportunity to comment. The Commission also notes however that the 30 day period is a *minimum* period prior to disclosure and that disclosure need not take place immediately upon the expiration of that time period. Because of the number of comments received by the Commission concerning the notice period, the Commission will carefully review this provision and make whatever modifications necessary to insure the manufacturers have a full and fair opportunity to provide comments and data.

Senator KASTEN. Thank you, Mr. Katz. The next witness is Mr. Andrew Popper, associate professor of law, Washington College of Law. Mr. Popper.

Mr. POPPER. Thank you very much.

I am honored to have been invited to provide this statement on this extremely important issue. First I am going to provide a commentary on rule 6(b) of the proposed regulation; then I am going to discuss some reasons for urging the committee to give consideration to repeal, amendment, or modification of 6(b).

My basic position is that the regulation that has been published adequately satisfies all the requirements of 6(b) of the Consumer Product Safety Act. Indeed, it reflects an excess of caution. I further believe that 6(b), as it is now interpreted by the Supreme Court in the *GTE-Sylvania* case (447 U.S. 102(1980)), probably delays and impedes the critical function of neutral agency disclosure of information in the possession of the Consumer Product Safety Commission.

Section 6(b) requires the Commission to take reasonable steps to assure the accuracy of the data released. Implementing that particular rule through regulation has been difficult. It has to be stressed that 6(b) and the regulations thereunder only require an assurance of accuracy in terms of reasonable steps. They do not require a guarantee of accuracy.

The Commission contemplates complying with 6(b) through a regulation that requires the CPSC to conduct investigations, evalua-

tions, product analysis, inquiries, and participate in consumer complaint verification or confirmation. All of these steps are designed to insure that there will be a minimum potential of inaccuracy. These procedures are more than reasonable steps. Indeed, they present an aura of fairness that is rarely paralleled in other administrative agencies.

The manufacturing community is given access to the Federal courts, Government sponsored retraction of misinformation, self-initiated corrective advertising and other measures, including most notably predisclosure notice and comment that makes this regulation fair under the circumstances. These measures are taken as a means of carrying out the balancing which 6(b) intended. The balancing is one that asks the agency to evaluate the value of disclosure against the potential risk of inaccuracy. That balancing is one which should be carefully considered.

The value of disclosing consumer related information either in the form of technical reports, or consumer complaints, or other available data within the Commission is represented in the policies embodied in the FOIA, in the Consumer Product Safety Act, in our Sunshine laws, and in the first amendment. These are overwhelming interests long decided by the Congress to be paramount. Consumers, research organizations, and persons who believe they have been injured by defective products are entitled to this data. Congress has long recognized that such interests are vulnerable.

Their vulnerability and need for information has led to powerful and all-encompassing Federal policies in favor of disclosure to guarantee that those interests are met.

A different set of values are involved when considering the risk of inaccuracy. The heart of the industry's argument is a legitimate one and it is an understandable position. The industry contends that the potential damage to manufacturers whose products are inaccurately or disparagingly described is overwhelming. Were I to represent the industry, I would share this view; but that is not my position nor should it be the position of the Congress. Indeed the claim of damage to industrial interests through inaccuracy is subject to dispute. It is based on a false premise that has not been supported by empirical data at any level.

First, the excessive protection provided for consumer initiated requests is predicated on the belief that there will be inaccuracies. The record simply does not reveal that to be true. For at least 60,000 releases over the past 9 years by this agency, I can find no more than five examples of information being inaccurate.

Second, the fear is predicated on the belief that persons who receive this information, if it is inaccurate, which statistically is in the range of insignificant, will somehow react negatively to the product notwithstanding retractions by the Government and corrective advertising. That is inconsistent with fundamental advertising theory. It insults the consuming public. It further makes the presumption that the imprimatur of the Commission will somehow follow information where it is nowhere intended, as in the case where data is released pursuant to a FOIA request or is agency initiated.

Third, the generalizations about risk of inaccuracy are not supported by meaningful data anywhere in the record from 1972 to

1983. The so-called incidents of inaccuracy described in the legislative history are well known to this committee. The best known are, the *Zerex* case and the *Firestone* case. These are cases where agencies participated in agency sponsored and agency initiated releases of information, situations where there was no predislosure comment, where there was no meaningful technical review, where none of the procedures which would be applicable under 6(b) were applied. In short, the situations used as examples of damage from inaccuracy could not happen within the context of the Consumer Product Safety Act unless the act was grossly violated by the agency.

Theoretical data on the "harm of inaccuracy" cited in the seminal *GTE Sylvania* decision (404 F. Supp. 352 (D. Del. 1975); 447 U.S. 102 (1980), consists of an article written by a Prof. Ernest Gellhorn in 1973 (Gellhorn, "Adverse Publicity by Administrative Agencies," 86 *Hav. L.R.* 1380 (1973) and two Federal district court decisions. I should note that the article written by Professor Gellhorn does discuss the risk of inaccurate information. However, in terms of analyzing the problem before this subcommittee the article indicates that the Consumer Product Safety Act represents an excellent example of a statute which protects the industry interests under consideration. The article was written in 1973 at a time when the agency had only nominal constraints on FOIA releases, and finds the CPSA, among all the statutes available to all the regulatory agencies, to provide a reasonable assurance of "likely accuracy," which is all Professor Gellhorn requires.

There are two cases cited by the district court in *GTE Sylvania*, *Cutler Hammer v. Universal Realty*, 285 F. Supp. 636 (1968) and *Coca-Cola v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (1972). The first involves a manufacturer who unscrupulously mimicked Coca-Cola advertising by inserting the phrase "cocaine." The other case involves a situation where a manufacturer mislabeled a product and knowingly misrepresented the product to the public. Certainly these are inaccuracies that cause harm, but these are not the kind of inaccuracies that could occur at the Commission level.

The regulation itself (16 C.F.R. 1101 et. seq. (1982) is valid in terms of the present wording of 6(b). Indeed, it probably interprets 6(b) as it must be interpreted after the *GTE Sylvania* opinion. However, I have to wonder whether that interpretation continues to be in the public interest. In an era of deregulation, a statute that restricts the flow of market information and impedes logical competitive forces has to be treated with extreme caution. This brings me to two final points.

First, I believe that 6(b) stands as an imposition to very precious interests. As 6(b) is now interpreted under the proposed regulation (an interpretation required by the Supreme Court and the courts interpretation of the legislative history), it imposes on the Congress a will it never had. It dilutes the goal of product safety. It causes those who are weak, vulnerable, and unprotected to be left in the dark in terms of potentially lifesaving information.

This is not hyperbole and exaggeration. When the general counsel of an agency tells me that they have not released meaningful data and that deaths have occurred over the last year because of



the way the statute is now properly interpreted by the Court, I wonder about the public interest.

My second reason is at a policy level. I believe that section 6(b) of the Consumer Product Safety Act, as interpreted by the Court, requires the regulation that has been proposed, and through that regulation treads dangerously close to protected constitutional ideals.

The first amendment protects the right to receive information. The first amendment prohibits the Government from restricting access to information absent powerful justification. It is indeed a balancing process. It is always referred to as a qualified amendment." However, that right to receive information has been explicitly recognized by the Supreme Court for at least the last two decades and implicitly for the last 200 years, as a precious right. Where there is a willing provider of data and a "requesting recipient" the Government is not to stand in the way when it becomes the conduit of information unless clear and discernable interests are involved.

The interests here are speculative. They include a potential for harm demonstrated to be highly unlikely to occur. That is too frail a reed on which to suppress the flow of information, particularly the kind of information embodied in a consumer complaint or independent and objective research.

I would like to thank the committee for giving me the opportunity to provide this commentary. I welcome your questions.

[The statement follows:]

STATEMENT OF ANDREW F. POPPER, ASSOCIATE PROFESSOR OF LAW, DIRECTOR, PROGRAM FOR ADVANCED STUDIES IN FEDERAL REGULATION, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

My name is Andrew F. Popper. I am an Associate Professor of Law at The American University Washington College of Law. I teach in the areas of Torts, Administrative Law, Antitrust-Trade Regulation, Federal Regulatory Process and Conflict of Laws. I received my Juris Doctor at DePaul University College of Law and the Master of Laws degree at the George Washington University National Law Center. I would like to thank Kathy L. Merrill and William E. Hawxhurst, students at The American University Washington College of Law, for their assistance in preparation of this testimony.

I am honored to have been invited to present testimony before the Commerce Committee on the important topic of disclosure of information by the Consumer Product Safety Commission. Specifically, I will discuss the practices of the Consumer Product Safety Commission and determine whether the proposed regulations regarding agency disclosure of information conform with the statutory obligations imposed under the 1981 amendments to the Consumer Product Safety Act. Additionally, I will address, as an alternative, whether 6(b) should be repealed, or modified.

#### I. GTE SYLVANIA: AN INTRODUCTION

Section 6(b) of the Consumer Product Safety Act (15 USC § 2055) allows the Commission to disclose information identifying specific manufacturers only after the Commission has taken reasonable steps to assure the accuracy of the information, and has satisfied itself that the information is released in a fair manner, consistent with the goals of the statutes the Commission is required to implement. The obligation to "take reasonable steps to assure the accuracy" of information released applies to the disclosure of Commission-initiated material, including investigations and reports prepared by the Commission staff and issued at the direction of the Commissioners of the Agency, as well as to "passive" releases of information requested by third parties outside of the Commission, when the information sought consists of consumer complaints, either in the form of letters to the Commission regarding allegedly defective products, records of phone calls made on a Commission "hot line", or similar product-specific information in the Commission's files. The information is

sought by lawyers, consumer groups, government agencies and assorted other interests.

At its simplest level, the question boils down to this: to what extent must the Commission assure the accuracy of any data it releases to the public? From the inception of the agency the Commission staff has taken the position that the degree of scrutiny required for such releases is high if the Commission is initiating a release of "Commission sponsored" research, investigations, press releases, or data which the Commission intends to be construed as a "Commission document." In contrast, Commission staff have contended that if the data requested consists of complaint letters, records of phone calls made to the Commission reporting allegedly defective products, information which has been submitted to the Commission by doctors, retailers or other third parties who on occasion have reason to assess consumer products, and the information is being released in response to a standard Freedom of Information Act request, then the burden of ascertaining the accuracy of the data prior to disclosure is different than with Commission sponsored documents. The dichotomy between the "active" releases of information (Commission initiated and sponsored) and "passive" releases of information (standard FOIA requests) came into existence because of an apparent ambiguity in Section 6(b) of the Consumer Product Safety Act.

In 1980, the Supreme Court resolved that ambiguity, finding there to be no meaningful distinction between active and passive releases of information, and finding further that for all releases of information where a specific manufacturer or manufacturers could be identified, the Commission must take reasonable steps to assure the accuracy of any information released. In *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, (1980), the Supreme Court held that Section 6(b) of the Consumer Product Safety Act falls within the definition of Exemption 3 of the Freedom of Information Act.

The Freedom of Information Act was drafted with "the basic objective of . . . disclosure," *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 (1979) subject to nine specific exceptions. Exception 3 states that substantive statutes can be written in such a way as to exempt an agency from certain requirements of the Freedom of Information Act by substituting internal substantive criteria. Exemption 3 of the Freedom of Information Act (FOIA) permits Congress to modify FOIA's full disclosure policy mandate by enacting a substantive statute which either specifies nondiscretionary nondisclosure of specific information, or explicitly establishes criteria for withholding information. 5 U.S.C. 552(b)(3) (1976). The Supreme Court found that section 6(b) of the Consumer Product Safety Act (CPSA) accomplishes a restriction on full and unimpeded disclosures leading to the conclusion that 6(b) establishes criteria for withholding information and/or delaying release of information for at least 30 days. These criteria (taking reasonable steps to assure accuracy), must be met whether the data is active or passive.

The Supreme Court reviewed the House Reports pursuant to § 6(b), noting that there was no "indication that the safeguards for the release of CPSA information are inapplicable when the Commission discloses information in response to an FOIA request." 447 U.S. at 113. Looking to the CPSA, the Court noted "The language of the CPSA thus provides little basis for accepting petitioners' claim that § 6(b)(1) does not apply to information released by the Commission in response to FOIA requests." 447 U.S. at 110. The very construction of the statute compelled the Court to conclude that no distinction was intended. For example, the Court noted that the statute lists (in Section 6(b)(2)) those situations when exempted disclosure is permissible (including imminent hazards, disclosures in the course of legal proceedings, etc.) but that listing does not include Freedom of Information Act requests for non-sponsored data. 447 U.S. at 109-10. Indeed, looking to the CPSA and the legislative history, the Supreme Court found that the only data suggesting the bifurcation urged by the Commission staff comes from a conference committee report made two years after the passage of the Consumer Product Safety Act. 447 U.S. at 117-18. Such reports do not take precedence over the clear meaning of the statute and the legislative history made at the time of passage 447 U.S. 118 n. 13. Armed with this interpretation, the Court concluded that there is no need to comply with the time limits set out in the Freedom of Information Act 447 U.S. at 121-83 because § 6(b)(1) supersedes FOIA time requirements. Instead of having as its goal prompt disclosure, the Agency must provide pre-release notice to identifiable manufacturers, an opportunity to submit comments, and take reasonable steps to assure the accuracy of released data. 447 U.S. at 105.

The problem with this approach is that the Consumer Product Safety Commission has as one of its prime directives the obligation to "assist consumers in evaluating the comparative safety of consumer products," 15 U.S.C. § 2051(b)(1)(2) (1976), a task

rendered almost impossible when time consuming and expensive procedures are required prior to the release of consumer product information. The Supreme Court's response to this difficulty is that excessive amounts of time may be the necessary evil in assuring accuracy. (An assurance of accuracy is in no way intended, but rather that "reasonable steps" be taken to assure accuracy.) In terms of the costs involved with producing information in response to legitimate requests, the Court found the fiscal problem to be one for the Congress. 447 U.S. at 123-24. The congressional response to these increased administrative burdens is a thirty percent cut in last year's operating budget for the Commission.

It is difficult to attack the Supreme Court's decision from the standpoint of legal construction of statutes and case law. The decision, however, has made difficult the release of valuable product safety information. The impact of the decision has been to delay the disclosure of product safety information, often with serious consequences. One Commissioner has put it succinctly: "CPSC's early warning alert has been muffled. Suspected hazards go unannounced for many months . . . we are forced to negotiate with companies before going public . . . months passed before we could warn about life threatening risks . . . more than a year elapsed before we could tell the public about a roto-tiller responsible for serious leg injuries and amputations . . . almost a year passed—in the face of deaths and numerous serious injuries—before we could disclose . . . incidents involving exploding gas water feeders." Statler, "The Watchdog That Couldn't Bark" at 2), on the file with the CPSC.

## II. BASIC LEGAL QUESTIONS FOR THE PROPOSED RULE

1. Does the Consumer Product Safety Commission satisfy its prediscovery duty to take reasonable steps to assure accuracy of the information requested under FOIA if it uses Commission staff or outside experts to investigate the incident or inspect the product and those persons find the initial complaint data to be corroborated? (Yes)

2. Does the Commission "assure that disclosure is fair in the circumstances" by: guaranteeing the right of including (or excluding on manufacturer's request) responsive data provided by the manufacturer or manufacturers; including staff generated explanatory comments; exercising discretion to restrict the range of disclosure, based on unique user patterns; or exercising discretion to restrict timing of disclosure based on a lack of finality of verifying data or of investigative reports? (Yes)

3. Does the Commission satisfy the mandates of § 6(b) of the Consumer Product Safety Act, which requires that disclosure be reasonably related to the effectuating purposes of the Act by stating that it will look to the specific and general purposes of the CPSA, FHSA, FFA, PPPA, RSA, and FOIA and read them to favor disclosure? (Yes)

4. Based on the Supreme Court decision in *Consumer Product Safety Commission v. GTE Sylvania* and other conventional legal reasoning, may the Commission release § 6(b) data without taking the steps enumerated in 16 CFR 1101 on the premise that the Freedom of Information Act policy of disclosure permits such releases of passive data? (No, not without amendment)

5. Under § 6(b) of the Consumer Product Safety Act, may the Consumer Product Safety Commission stamp a disclaimer on passive Freedom of Information Act requests and disseminate that information so long as the disclaimer makes clear that that Consumer Product Safety Commission neither agrees nor disagrees with the substantive comments in the disclosed information. (No, not without amendment)

6. Do the requirements established in § 6(b) of the Consumer Product Safety Act contravene public policy by prohibiting the disclosure of critical consumer information, suggesting that § 6(b) should be repealed and be replaced by a statute which allows the Commission to disclose information without undergoing the process now required. (Yes)

7. Should § 6(b) regulations require thorough investigation in all cases? (No)

8. Do the regulations set in 16 C.F.R. 1101 require the Commission to do more than the Congress intended in passing § 6(b) of the Consumer Product Safety Act? (Yes)

## III. GENERAL COMMENTS ON THE PROPOSED RULE

1. The obligation to assure accuracy applies to consumer product complaints and public source material. If an item appears in a newspaper, or is produced by standard research services and is in the possession of the Consumer Product Safety Commission and relates to a particular product, the Commission cannot release that information without first undergoing § 6(b) review. Accordingly, the capacity of the Commission to act as a clearing house of consumer information is restricted. In the case of a research report, this would include adherence to the regulations in 16



C.F.R. 1101.32(a) (1) and (2) which require that the Commission contract with outside experts or use its own technical staff and develop an investigation or inspection report to corroborate the data in the report or article in its possession. This appears to constitute an unnecessary duplication of effort, if the report has already undergone substantial scrutiny.

2. When a request for information is received by the Consumer Product Safety Commission seeking the disclosure of information found in consumer complaints from which the name of the specific manufacturer can be discerned, the Consumer Product Safety Commission proposes to release that information only after it solicits and receives complaint confirmation from the original complainant, or other persons named in 16 C.F.R. 1101.32(a)(3) and after the Commission notifies the manufacturer, solicits its comments and attaches those comments to the complaint letter (unless the manufacturer would prefer not have its comments submitted). This raises the issue of whether these constitute "reasonable steps to assure accuracy" as is required under § 6(b) of the Consumer Product Safety Act.

3. The Commission's interpretations of 6(b) and the regulations that flow therefrom, cause the Commission to negotiate press releases to avoid litigation by manufacturer who have a right under § 6(b)(2) to sue the Commission prior to disclosure. This particular power in manufacturers reduces the capacity of the Commission to provide an active consumer product safety influence.

4. Retailers are in no different a position than customers when seeking out information about products that they plan to sell. For example, a retailer contemplating the purchase of an item from a manufacturer or wholesaler who seeks information about that product from the Consumer Product Safety Commission will not be given information in the Commission's files until the Commission goes through the verification procedures set out in the proposed regulation set out in 16 C.F.R. 1101 and following.

5. Section 6(b)(5) of the Consumer Product Safety Act addresses disclosure options regarding substantial product hazard information received pursuant to Section 15(b) of the Consumer Product Safety Act. Even though the Commission has been advised that there have been deaths associated with a product, if the Commission has done no independent investigation it will be prohibited from revealing that information. Special exceptions for disclosure include: issuance of a complaint by the Commission; the acceptance of remedial action plan by the Commission; manufacturing entity consenting to disclosure; the Commission files an imminent hazard action; or the Commission has reason to believe a prohibited act has been committed.

6. The cost of administering § 6(b) is substantial both in terms of time and dollars.

7. Between 1973 and 1980, the Consumer Product Safety Commission responded to over 50,000 Freedom of Information Act requests. According to the Commission's statistics, eighty percent of those requests were answered within the 10 day time period required under the Freedom of Information Act, and the remainder were answered within the 30 days. Since 1980, requests for information have taken fifteen weeks and more, according to various Commission statements. The Commission has suggested that it has a backlog of over 3,000 requests for information, and that the verification and research process contemplated under proposed Regulation 1101 will not decrease significantly the time required to process information requests.

In 1981, the Consumer Product Safety Act was amended, giving additional time periods to manufacturers prior to disclosure for the submission of comments; establishing in (b)(3) access to the federal district court; and highlighting the need to comply with Section 6(b) of the Consumer Product Safety Act.

8. The requirements under 16 C.F.R. 1101 et. seq. will increase by ten fold the time required to process requests for basic information in the Commission's files.

9. The proposed rule will improve the processes now being used to verify information released by the Commission in that it will provide a sharpened focus for comments from manufacturers, inform the staff of procedures to be followed, and eliminate some of the uncertainties surrounding the verification process. It will also be extremely time consuming and expensive to implement.

10. Regulation § 1101.32 would establish three alternative means of "taking reasonable steps to assure accuracy" of the information the Commission proposes to disclose. First, the Commission could have its own staff or a "qualified" person from outside conduct an investigation or inspection to corroborate the material being disclosed. Alternatively, Commission staff or "qualified" outside person could conduct a technical, scientific or other evaluation which would lead to data which would corroborate the information sought to be disclosed. Finally, with respect to consumer complaints, rather than solicit an independent investigation or technical report, the Commission may submit a letter (attached to the proposed regulation) to the person who originally provided the information urging the original submitter to review the

information provided and check all information for accuracy. The request for correction and confirmation, it is thought, would to provide a reasonable check on the validity of the complaint information. In all three "verification scenarios" the Commission would provide to the identified manufacturer or manufacturers the original complaint information and technical or investigatory data, and permit comments to be attached when the information is ultimately disclosed to the requesting party. Further, the information ultimately disclosed would undergo final review by Commission staff to assure that the information is facially consistent.

11. To take reasonable steps to assure that the disclosure of information is "fair in the circumstances," the Commission would provide the manufacturing entity with the original complaint information, subsequent verification data and reports which the Commission intended to disclose. In addition, Regulation 1101 would require that the Commission provide additional explanatory comments if the original complaint information, comments on verification information could be taken out of context or be misleading. The Commission also would be obligated to delay the release of information if reports or investigations were incomplete. The Commission would be required to restrict the release of information if it would appear that releasing to a given region (as opposed to releasing nationally) would serve a useful purpose.

12. The Commission would have to take reasonable steps to assure that the disclosure of information is reasonably related to effectuating the purposes of the statute the Commission administers. In seeking to explain to the public how the Commission would ascertain this purpose, the Commission has determined that all of the statutes it administers have as one of their primary purposes disclosure. Accordingly, the section of the proposed regulation dealing with implementing purpose simply says that the Commission will seek out the specific and general purpose of each statute it enacts, to guarantee that it is acting consistent with its purpose. This section of the proposed regulation is vague in that it does not take the opportunity to engage in the balancing Congress apparently intended in the passage of § 6(b). Quite obviously, Congress intended for there to be disclosure of consumer information, and also intended that the Commission seek to validate, where possible, the bases for that information. The difficulty in achieving this balance could have been hammered out in Regulation 1101.34, but the Commission chose not to do so.

13. When the Commission releases information in the form of a press release, fact sheet or other "sponsored reports", under § 6(b), it must take substantial steps to assure that the information is accurate. These steps have been effectuated pursuant to Directive 1450.2 for sometime. All appropriate offices within the Commission, including the General Counsel's Office, participate in the review. In addition, commentary is solicited from identifiable manufacturers.

14. There is some concern that the response of the manufacturing community during the Regulation 1101.32 "comment phase" leaves something to be desired according to Commission staff. The staff contends that many manufacturers refuse to participate in product safety analysis, seeking to place the administrative burden on the Commission. Apparently, manufacturers contend that the Commission's obligation to investigate is the equivalent of providing a guarantee of accuracy. Accordingly, the manufacturers wait for the Commission to provide reports and technical data, and then criticize the Commission when such reports are not provided in every case. Such an approach by the manufacturing community, if true, appears highly irresponsible, and also the consequence of a gross misinterpretation of the Consumer Product Safety Act.

15. In passing § 6(b), Congress did not intend to make the Commission the guarantor of the accuracy of disclosed information. Instead, Congress requested that the Commission take reasonable steps to assure accuracy. So long as the Commission takes these steps, it is in compliance with the mandates of § 6(b). A reasonable step to take would be to provide a manufacturer of a product with a complaint letter and solicit the manufacturer's response. Other reasonable steps might include soliciting independent verification of technical data. It would be unreasonable, however, to think that all of those steps would be required in every case. If a manufacturer were to waive the opportunity to provide its own commentary on a product, then it would have to accept the consequences of that waiver.

16. The heart of the debate surrounding the proposed regulation (16 C.F.R. 1101) involves the notion that complainant confirmation is a valid form of assuring the accuracy of a statement in a consumer complaint. Industry comments have been most critical of this section, suggesting that merely verifying an incident and asking a product user for his or her opinion as to why an incident occurred does not comport with the requirements of § 6(b) which mandate that reasonable steps be taken to assure accuracy. This seems a purely defensive posture. It would seem that verifying an incident, and requiring some form of complainant review is a most reason-

able step. The question is whether it is a sufficient step based on § 6(b) as interpreted in *GTE Sylvania*. Further, consumer confirmation is only part of the process. Prior to disclosure, the consumer statement, subsequent verification and relate data should be transmitted to the manufacturer so that it can present its own comments. This package, coupled with additional explanatory comments placing the complaint in context along with existing research data is what ultimately will be released. This presupposes that a Commission investigation or technical report is not used.

16(a) Commission's efforts appear to be designed to allow the Commission to not initiate comprehensive technical reports and inquiries every time a request is made for consumer complaint data. It would be unreasonable to require the Commission to initiate a formal investigation or technical inquiry each time a person sought information from the Consumer Product Safety Commission regarding the safety of a product within the jurisdiction of that body. Complaint information is valid information, even if it contains technical inaccuracies. That a complaint was received by the Commission is a fact worthy of disclosure. So long as it is made clear that the Commission does not verify the accuracy of consumer complaints, and so long as a manufacturer is given an opportunity to supplement or, respond to, or comment on those complaints, one is hard pressed to call this process unreasonable.

16(b) The process is obviously not a process that "guarantees accuracy". Indeed, guarantees of accuracy were never intended by the Congress. If a person exercises the legitimate rights that every person has to ask the government if they have information about a particular product, it is the government's obligation to provide that information and, pursuant to § 6(b), to take those reasonable steps to assure that the information is accurate. It seems that such steps are taken when the original complainant is given an opportunity to analyze the information originally submitted and when a manufacturer is given an opportunity to respond. Courts are not required to ensure the accuracy of findings, but only to ensure that reasonable processes are used. Nowhere in our jurisprudence is a "guarantee" of accuracy required to make the kinds of releases that are involved under § 6(b).

17. It has been pointed out that the Consumer Product Safety Commission is being asked to participate in a verification process that is not required of other agencies of the federal government. Commission staff have contended that the Food and Drug Administration and most other regulatory agencies disseminate information within their files, without having the additional obligation of ascertaining the accuracy of the data.

Although it may be more difficult for the Commission to release information because of § 6(b) and *GTE Sylvania*, that is nonetheless the state of the law. I came across no convincing legal arguments that would suggest that the Commission is entitled to do anything other than only disclose information after it has taken reasonable steps to assure accuracy. The impact of § 6(b) in terms of public policy in the product safety area, however, is quite another matter. The Consumer Product Safety Commission is supposed to be in the business of providing a federal forum for formal administrative action regarding products which are allegedly unsafe, as well as to act as a clearinghouse for consumer information. It is difficult to be a clearinghouse if one cannot release that information. To that extent, the regulation and § 6(b) frustrate the primary purpose for the Commission's existence.

18. There has been considerable comment on § 1101.13 of the proposed regulation which attempts to carve out an exception for data confirmation when the information is being transmitted to "only a few members of the trade". Industry has complained that if any member of a particular industry ascertains the identity of an individual about whom false information is to be disclosed, the effects could be significant. This position presupposes that civil remedies for disparagement, defamation, and retraction are inconsequential. It further presupposes that industries are entitled to have only truthful information circulated in any market. Such a position creates a protective environment that is unrealistic and inconsistent with American business practices.

19. A legitimate concern of the industry is that the Consumer Product Safety Commission might participate in "trial by press release" if the standards for information verification are greatly relaxed. Such practices, were they to occur, would be a concern for the Congress. Trial by press release is an illegitimate and unlawful exercise of authority. In reviewing the literature in the field, I found no instance where such practice had been undertaken. If nonverified data is released in a press release, such a release would be in direct conflict with the unambiguous portions of § 6(b) regarding substantial scrutiny for Commission-sponsored and initiated information, press releases or similar data. If the Commission does not comply with its own regulations and misuses the power vested in it, then affirmative steps must be taken. If, however, the Commission exercises the authority it has properly, the fear



that it one day may not do so seems a frail weapon with which to destroy a critical and potentially lifesaving flow of information.

20. The regulation would not permit distinctions between types of information, other than the gross distinction referred to above as "sponsored or initiated data" versus nonsponsored data. In effect, the regulation lumps together consumer complaints from persons with no technical training with studies produced by objective entities including the National Institutes of Health, universities and other organizations. It would seem that external data, based on objective testing by well-recognized authority, could be released using steps other than those set out in 1101.32.

21. In evaluating the policy conflict surrounding CPSC disclosure, one is struck by the energy directed to the question of what steps must be taken to assure the accuracy of information submitted by lay-consumers. On one hand, industry argues that contacting consumer complainants and asking them to review and confirm information, coupled with giving the manufacturer an opportunity to comment, constitutes insufficient or unreasonable steps to assure accuracy. On the other hand, the Commission contends that those steps are reasonable and sufficient to assure the degree of accuracy needed when the Commission is releasing such a data.

21a. The premise of industry's argument is that the harm of disclosing even isolated bits of misinformation is of great magnitude; indeed, the harm of disclosing any misinformation is of greater magnitude than the benefits to be derived from a liberal disclosure policy. From a policy perspective, this is not a legitimate or realistic evaluation of the congressional intent underlying the Consumer Product Safety Act. Had the Congress intended to assure that no inaccurate information would be disclosed, it would not have imposed an obligation only to take "reasonable steps to assure accuracy", nor would it have announced that a primary function of the agency is to disseminate information.

21b. It is understandable that industry would like to have only accurate information disclosed, if that is in fact their goal. It is likewise understandable that advocates, on behalf of industry, would like to delay the disclosure of any information potentially adverse to the interests of their clients. Nevertheless, merely because the arguments are understandable does not mean that they are valid or accurate. On one hand, there is the powerful national pre-disclosure policy embodied in the Freedom of Information Act and the enabling legislation for the Consumer Product Safety Commission. This policy suggests that market information allows classical market forces to function at their highest level, and creates the greatest incentives for effective research, market efficiency, product innovation, and competitive pricing. These goals are consistent with the national policy favoring competition. On the other side of the continuum is the notion that manufacturers of particular products should not be subjected to the potential harm which could be caused by the publication of inaccurate information, if that information degenerates their good will and reputation. Both policies are valid; the question is simply whether one is of greater magnitude than the other.

21c. In making policy judgments, a common approach is to evaluate the power relationships involved. The business community has at its disposal private advertising, a right of retraction, injunctive relief, and also pre-disclosure comment rights. On the other side, it can be argued that national vehicles, or even regional vehicles for the dissemination of consumer product information are unavailable, outside of the resources of the Consumer Product Safety Commission *Consumer Reports* magazine, consumer information groups and consumer enterprises do not have the resources to communicate, nor do they have the ear of the public.

22. In evaluating the proposed regulation (16 C.F.R. 1101 et seq.) arguments have been made regarding the delegation to Commission staff of decisionmaking authority regarding classification of disclosure requests. The idea that fulfillment of disclosure requests is a task that should only be undertaken on a majority vote of the Commission is at odds with the Administrative Procedure Act, principles of delegation, and common sense principles of agency administration. The only possible rationale for such a position is that the consequence of requiring commissioners to make disclosure decisions is protracted and endless delay. In establishing a policy of disclosure, setting guidelines (as in the promulgation of the proposed rule) or similar matters, the Commission must act as a collegial body. For the day-to-day decision-making process, however, it seems absurd to even suggest that information requests must be approved by a majority of the Commission.

23. Assuming that section 6(b) is not repealed or amended, are the protections provided in the proposed rule "reasonable steps" to assure accuracy, fairness and consistency with legislative purpose? Some commentators to the rule (notably the Chamber of Commerce) suggest that the rule is inadequate and should be retracted by the Commission and a more rigorous review scheme established. These interests

argue that a technical investigation and inquiry are required prior to the release of any information. They presume that the disclosure policy and verification steps which underlie § 6(b) and the proposed regulation have as their consequence "mindlessly pumping out misinformation about products." (Statement of the Chamber of Commerce filed before the Consumer Product Safety Commission, February 4, 1983 at page 3.) The premises underlying the charge that the Commission will "mindlessly" pump out "misinformation" requires some inquiry. First, the image sought to be projected is that of an agency which operates as a revolving door for dangerous inaccurate statements. This image has nothing to do with the Consumer Product Safety Commission. The premise of "misinformation" is equally absurd. No empirical data has been provided by the Chamber of Commerce or any other entity regarding the accuracy of the information disclosed. It bears repeating that one can understand a fear that inaccurate statements might harm a person or an interest. But that fear, in these circumstances, is wildly out of proportion with reality and unsupported by any kind of meaningful empirical data.

24. The Commission staff has noted that the process of "taking reasonable steps to assure accuracy" is made more difficult when a manufacturer refuses or declines to comment on a proposed release of information which identifies that manufacturer. The staff contends that the manufacturer has a duty to provide information or regarding these complaints. From a due process perspective, the staff's position seems reasonable. Providing an opportunity for comment and a guarantee that comments of the manufacturer involved will be provided to the requester satisfies fundamental fairness requirements. A slightly separate issue is whether, in face of a "nonresponse" by a manufacturer, the Commission has any other obligation other than the complaint letter confirmation process.

Assuming that § 6(b) is left intact, it would seem that the Commission reasonably might include a comment in the disclosure that the manufacturer has declined further comment. In addition, the Commission might consider disclosing other information from its files relating to the consumer product. This is not to suggest additional testing; rather, it is to suggest that if § 6(c) is to be fully implemented, reasonable steps to assure accuracy include a review of internal data within the control of and readily available to the Commission. The District Court in the *GTE Sylvania* case made it quite clear that the obligation "to take reasonable steps" does lie with the Commission. Reasonable steps include confirming data through the original complainant or data provider and seeking commentary from the manufacturer. A final reasonable step might include a summary review of the Commission's own files for similar information.

25. Looking solely at the process of complaint confirmation suggested in the proposed regulation § 1101.32(a)(3) certain industry commentators have suggested that consumers are not trained as investigators and have a stake in the outcome of the submission of any complaint that transcends identifying defective products, i.e., subsequent product liability litigation. Although these two points have potential shortcomings in terms of accuracy, they do not offset the value of asking someone in a more detached position to assess information provided. If § 6(b) is to remain intact, the Commission will probably be required to draft more than one form letter for complaint confirmation, as is the case in the proposed regulation.

Different incidents with different products will require different types of inquiries for the process of accident and defect confirmation. Because the purpose of the consumer inquiry is to ascertain the consumer's belief as to the basis for the incident, not whether the incident occurred, requests regarding the consumer's investigation, knowledge of the product, experience with the product in the past, independent investigation undertaken by the consumer, and isolated other data will become relevant. It would seem that the production of a series of form letters, to be selected based on the nature of the complaint sought to be verified, would be a preferable means of complaint confirmation, rather than the use of a single letter with its fairly limited scope.

26. § 1101.31(d) involves data disclosed in the past. Previously disclosed data which has gone through § 6(b) procedures should be available for future requests. Naturally, if the Commission is aware of information that would render that data inaccurate or outdated, some action must be taken to rectify the situation. The technical problems in providing notice have been emphasized by the staff of the Commission. They contend that each manufacturer needs to be notified, that the notice cannot identify other manufacturers of the product, and that this task entails many hours of valuable staff time, only to prove a point already established—that the information exists. The debate regarding previously disclosed information seems to hinge on the degree of discretion the Congress wishes to give to the Commission.

The Consumer Product Safety Commission exists to provide information about defective products and to take affirmative action if those products constitute a serious or imminent hazard. In light of the expertise within the Commission, Congress should feel comfortable in giving technical staff the discretion to ascertain when information has become outdated. The manufacturing community, enjoying the benefits of doing business and selling products which are subject to the jurisdiction of the Commission, should provide voluntarily additional information that rectifies or changes data within the possession of the Commission and which has, in the past, been provided to a manufacturer for comment.

27. Several manufacturers have raised the question of whether the rules regarding § 6b(6), proposed in 1101(c) are interpretive statements which require no notice and comment insofar as they are exceptions to § 553 of the Administrative Procedure Act, or if they are new substantive rules regarding a notice and comment rulemaking. This is an interesting administrative law problem, but it is easily resolved by reference to both the Administrative Procedure Act and the recent case law. The *Batterton* decision makes it quite clear that the rule modifications contemplated by the Commission do not directly and immediately affect a substantive and discernible interest. They are not substantive in character. They deal with hypothetical and speculative problems. The application of these new principles awaits the first request, and will not immediately be implemented, as would a means of calculation (the situation in the *Batterton* case). The nature of the so-called "policy changes" in the proposed rule simply does not come to the level that was contemplated in the *Fountainhead Group* decision, as is suggested by various industry spokesmen *Fountainhead Group, Inc. v. CPSC*, 527 F. Supp. 294 (N.D. N.Y. 1982). Indeed, there is no change in disclosure policy, but only a change in the projected means of implementation. Such changes do not require a notice and comment rulemaking.

#### IV. THE RISKS OF INACCURACY: AN UNSUBSTANTIATED PREMISE

1. Between 1973 and 1980, the Consumer Product Safety Commission responded to 50,000 FOIA requests. Nowhere in the documents filed regarding the proposed rule nor in the record (outside the *Sylvania* case) are there meaningful examples of adverse impact from those disclosures. Obviously, the market impact feared by industry did not occur, or, alternatively, all 50,000 requests contained accurate information. In light of improbability of the latter, some attention should be given to the primary asserted rationale of those seeking more stringent restrictions on disclosure. It is legitimate for a manufacturer or private dealer to fear that an inaccurate statement will be made about its product, character or capacity. The most celebrated example of such adverse impact is described at great length during the debates to the passage of the Consumer Product Safety Act by Congressman Crane. The same example is used in a comment filed by the Chamber of Commerce. It involves the Federal Trade Commission's activities regarding the Xerox antifreeze advertising campaign. Other examples on this debate have included the Firestone Tire situation, and, in the *GTE Sylvania* case, an apparent general reference to the presumption that adverse impact will occur from inaccuracy. First, all of these situations involved agency-sponsored, agency-initiated, long-term, highly publicized advertising campaigns. The Xerox example would be characterized under the existing regulatory system as an "active" Commission-initiated release of sponsored information.

2. In Xerox, the FTC believed that the product was being advertised in an unfair and misleading manner. Under the present regulations, the scrutiny required prior to the release of similar information by the Consumer Product Safety Commission, as opposed to the Federal Trade Commission, is substantial. Independent reports and investigations must be used and clearance must come from each level of the agency. This example is so radically dissimilar from the kinds of disclosure that are at the heart of the issue before the Committee as to render the example meaningless. The Federal Trade Commission proceeded without the kind of scrutiny required by the Consumer Product Safety Commission; the adverse publicity given by the Federal Trade Commission was not cleared at every level; the Federal Trade Commission does not have the technical resources the Consumer Product Safety Commission has; nor did it use the comment system required by the Consumer Product Safety Commission and in use since the beginning of the agency. Indeed, there is virtually nothing that happened in the Xerox case that arguably could happen in a Consumer Product Safety Commission disclosure. The Firestone Tire example is similar, and bears no repetition.

3. Specific information regarding the "adverse impact" which would occur from the release of inaccurate information is noticeably lacking in the material submitted by industry. Similarly, the *GTE Sylvania* decision reaches the conclusion that



inaccurate information is damaging, although it provides no empirical support for that proposition. In the District Court opinion, *GTE Sylvania v. Consumer Product Safety Commission*, 404 F. Supp. 352 (D. Del. 1975), the court refers to an article by Professor Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1381 (1983), to support its conclusion that misinformation could be harmful. The article discusses at some length the problems involved with agencies that randomly release information without giving any thought to whether the information is accurate. Professor Gellhorn concludes that this is potentially a violation of a duty. In the only piece relied on by the court or the manufacturing community, Professor Gellhorn requires that agencies release information which is "likely to be accurate" and where the benefit to the "public is substantial or at least worth the risk of harm" if the information turns out to be false. This standard sounds very much like the language in § 6(b).

Section 6(b) requires reasonable steps to assure accuracy, not a guarantee of accuracy. Likewise, Professor Gellhorn does not require a guarantee of accuracy by any standard. In addition, Gellhorn states that potentially inaccurate information should be released if the benefit to the public is substantial. There is virtually no debate that the public benefits from having information about potentially defective products. This benefit is far greater than the potential risk of harm from isolated pieces of non-sponsored misinformation which can easily be retracted and countermanded through advertising. Gellhorn, *supra* at 1440, 1441. Accordingly, the entire thrust of the proposition that "misinformation creates a greater risk than nondisclosure" is not supported by the only source which allegedly supports the statement.

4. Of equal interest is the fact that the Gellhorn article uses the Consumer Product Safety Commission as an example of an agency which is taking steps to reduce the problem of disclosure of inaccurate information. The contention in the article is that the protections provided in the Consumer Product Safety Commission Act were, in 1973, the date of the article, adequate and reasonable. Gellhorn, at 1435). Further, Gellhorn states that the type of protection provided in the Consumer Product Safety Act should be used at other federal agencies, and indeed suggests that the Administrative Procedure Act should be amended to accommodate the kind of predisclosure scrutiny intended in § 6(b)—as interpreted in 1973, a time when § 6(b) was very liberally interpreted. Gellhorn, *supra* at 1435. Gellhorn's position is unique, considering his Gellhorn's general policy on agency disclosure is highly restrictive. Indeed, Gellhorn believes that the Administrative Procedure Act should be amended to allow for agency disclosure only when the requester establishes that he or she has a "reasonable need for disclosure." Gellhorn, *supra* at 1435). This is no longer a debatable proposition—well-established policy suggests that the idea that one can only get information under the Freedom of Information Act if one "needs to know" that information belongs to bygone era. Notwithstanding this preference for non-disclosure, Gellhorn—the only authority supporting the industry's general position on adverse effect which is in any way applicable to the Consumer Product Safety Commission—uses the Consumer Product Safety Commission as an example of how to avoid adverse effect.

5. The two cases on which the *GTE Sylvania* District Court opinion relies for the proposition that misinformation occasionally released creates a great risk of harm are *Cutler Hammer, Inc. v. Universal Relay Corp.*, 285 F. Supp. 636 (S.D.N.Y. 1968) and *Coca-Cola v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972). Both cases involve conscious and intentional abuse of trademarked information. In the *Coca-Cola* case, Coca-Cola's protected phrases are intermixed with phrases regarding cocaine. This is done by an entity in the private sector. In the *Cutler Hammer* case, the defendant consciously and willfully misrepresented a product through the labeling process. Certainly, this type of misinformation has adverse consequences. Nevertheless, these practices are dramatically different than anything the Consumer Product Safety Commission conceivably could engage in within the confines of its statute.

5a. In short, the literature used to support the proposition of adverse effect from periodic and potential inaccuracy does not support the contention made by the industry. For research purpose, inquiry might be made of *Smith v. Federal Trade Commission*, 417 F. Supp. 1068 (D. Del. 1976), in which the court held that the Federal Trade Commission's publication of information that was potentially inaccurate did not rise to the level of irreparable injury, particularly when the person who allegedly would be harmed by the misinformation had a right to challenge the accuracy of the data is subsequent litigation. *Smith* stands for the proposition that direct and immediate injury, of a nature sufficient to justify a preliminary injunction, would not be found simply because one feared that information was potentially inac-

curate when there was a right to correct the information through the litigation process.

6. In the matter before the Congress, the rights provided to the manufacturer including injunctive relief (guaranteed as a matter of statutory prerogative), retraction, corrective advertising, coupled with the dissemination of industry comments any time information is distributed regarding an identifiable manufacturer, seem to suggest that the position of the industry is simply untenable. It is not supported in the case law, and reflect nothing more than an understandable but unrealistic fear.

7. Parenthetically, in 38 F.Reg. 16839, June 27, 1973, a recommendation of the Administrative Conference of the United States was published regarding adverse publicity (Recommendation No. 73-1). In that recommendation, which is written from the perspective of a presumption that information will be inaccurate and that people will rely on that inaccurate information, the Administrative Conference recommends that "reasonable precautions [be taken] to assure that the information stated is accurate." *Id.* § 305.73-1. This protective regime replicates that which is available under § 6(b), and again suggests that if Congress chooses to maintain § 6(b), it should be more than satisfied with the way the regulation is now interpreted and adopted.

8. There is not valid empirical basis, based on the *GTE Sylvania* case, the legislative history, or the record of the first seven years of the Consumer Product Safety Commission, to suggest that serious and intentional disclosures of inaccurate and destructive information would occur. Moreover, there is no empirical basis presented by the industry which would support the proposition that periodic inaccurate information which is retracted has the kind of long-term disadvantages that industry claims it will have. The fears of industry are predicated on an unrealistic, albeit understandable assessment of market activity, consumer behavior, and the protections now provided by the Consumer Product Safety Commission. If anything, they exceed the kind of protection that any other agency provides, or has provided, since passage of the Consumer Product Safety Act or the Freedom of Information Act.

9. Due Process Assessment: Under the proposed regulation, if the CPSC conducts an independent technical, scientific or other investigation to corroborate data in a consumer complaint letter and provides a manufacturer with an opportunity for comment, that information can be released. This must be done if the manufacturer is readily identifiable from the information. In the case of a Commission-sponsored release of information, even if the manufacturer cannot be identified readily, the Commission will verify the information. This only applies to press releases and other data which is intended to carry the imprimatur of the Commission. This process comports with fundamental notions of due process of law.

Due process is a relative term. By and large, the risk of imposing a civil disability must be measured against the need for the proposed government action. If the risk is higher than the need for the government action. If the risk is higher than the need for the government action, but the government action is nonetheless required, due process requires government steps to provide the degree of protection that correspond to the risk of disability. In the situation before the Congress, the risk of disability is the risk of misinformation or inaccuracy. To combat that risk, manufacturers are asked to comment on the accuracy of data, and providers of information are asked to confirm and, in a sense, take an "oath" to the validity of the data prior to release. If this is done, the true risk involved—that of inaccuracy—is substantially reduced. Due process is then satisfied, and the appropriate administrative function of disclosure can go forward. If the Congress maintains § 6(b), it would seem from a perspective of due process that the appropriate protections are provided.

10. *Presumptions About the Ability to Evaluate Information.*—It is legitimate to ask whether the risk perceived by industry is one to which the industry should be exposed if the data released is not confirmed. The disclosure of inaccurate information does little to improve consumer awareness. A policy of delayed disclosure or nondisclosure, however, guarantees consumer unawareness and the maintenance of risks. Disclosing information is a valuable means of notifying the public of potential risks. Disclosure of consumer information notifies testing organizations and purchasing retailers of potential risks. The public, testing organizations, and other entities which become aware of the information disclosed must then evaluate the data. If the data is inaccurate, that information must be disseminated with the same degree of vigor with which the original disclosure was released. People must be free to have information and then evaluate it for its truth and accuracy.

Industry appears to presume that there will be inaccurate information and that people will react to that inaccurate information, even when the Commission makes clear that the information has not been verified. Two false premises underlie industry's position. First, industry apparently presumes that the public is incapable of

accepting retractions which come from the government and from advertising. Second, industry apparently believes that any piece of information which is produced as a nonverified response to a Freedom of Information Act request will be taken as true and not challenged. Such thinking shortchanges the public. It presupposes a type of knee-jerk reaction which has not been verified statistically and presumes an absence of intellectual integrity.

11. It may be that advertising theory is predicated on the susceptibility of the public to be influenced by information. Even in its crassest form, however, that theory requires a consistent and repetitive exposure to information before the information is absorbed. The recipient of the information, according to conventional advertising theory, must be exposed to the information on a frequent basis. After a certain period of time, advertising theory suggests that the person will believe the information to be true and if the advertising plan is successful, act on the information. Were it not the case, we would not be subjected to the countless repetitions of major advertising programs. Industry cites, in its few "horror stories," examples of how a certain story about a product appeared in 80 different newspapers. If the story appeared in 800 newspapers, it would be of no consequence. It would only be of consequence if misinformation were consistently and regularly repeated in the same paper. That repetition would have to occur over a period of months, and occur in the absence of a retraction from the information provider before any basic advertising theory accepts that the information is true.

In light of the right to get a retraction at the same level of magnitude of the original disclosure and in light of the opportunity to provide comment, one is hard pressed to see how the industry fears of harm can be justified. As is stated in a dissenting opinion of Commissioner Statler, "in the end, reputations are durable. A firm that consistently produces quality goods is not likely to have its good name or sales lastingly harmed by one or more consumer complaints pointing to a safety defect, especially when it is taking positive steps to correct the problem." (*In the Matter of Proposed Rules Under 6(b) of the Consumer Product Safety Act*, dissenting opinion of Stewart M. Statler filed April 13, 1982 at page 6.) Commissioner Statler goes on to note that "a balance must be struck between the public's right to know . . . and a company's legitimate concern about unfair or misleading statements." (at page 7) Such a balance does not require the delay of ultimate nondisclosure of critical information based on the premise that an assurance of absolute accuracy underlies congressional intent in § 6(b) of the Consumer Product Safety Act.

#### V. AMENDING 6(b): ISSUES AND DISCUSSION

1. One option available to the Congress would be to amend § 6(b) to allow the Commission to release consumer complaint letters and independently-submitted reports with a clear disclaimer, announcing that the information which has been requested is from the files of the Consumer Product Safety Commission but has been neither verified nor investigated. Under such a scenario, it is certain information may turn out to be inaccurate. Are such inaccuracies of such great consequences that the Congress is compelled to take all steps to prohibit the release of any information, so that a small amount of misinformation can somehow be kept from the public?

The risk of nondisclosure of accurate information seems to be far greater than the risk of not disclosing any information out of fear that some information might be inaccurate. The public lives with misinformation every day. It is called advertising. Were Congress to impose the same aura of accuracy on private sector advertising that the industry is asking the Congress to impose on releases of Commission data, the moans and cries of the industry would be heard from Washington to Los Angeles. Each year, billions of dollars are spent advertising products, placing them in a light most favorable to the manufacturer, and, by any reasonable measure, suggesting to persons that they purchase products which they do not need. The suggestions created in advertising cause a misallocation of resources. Yet, no one has ever suggested that the legal powers used to sanction unfair advertising be modified to assure accuracy.

2. Manufacturers have contended that the Consumer Product Safety Commission has not been sufficiently diligent in assuring the accuracy of the information it releases to the public. This quest for accuracy presupposes that the harm of releasing misinformation is greater than the harm of releasing no information at all. The legal system tolerates the release of nonverified data that predictably would devastate a private person through the application of the Freedom of Information Act. Civil complaints are a matter of public information and are released without scrutiny, checks for accuracy or other measures of verification. Information relating to



pharmaceutical substances subject to the jurisdiction of the Food and Drug Administration can be released, notwithstanding the potentially adverse effect on the buying public of such information.

3. Information which ends up being inaccurate is easily corrected by advertising, and by the fact that the Consumer Product Safety Commission is required to take strong steps to retract inaccurate information.

4. § 6(b) of the Consumer Product Safety Act has been interpreted properly by the Supreme Court in the *GTE Sylvania* case as requiring the Commission to take steps to assure that any information it discloses from which one could identify a manufacturer or labeler must be disclosed only if reasonable steps are taken to assure the accuracy of the information. The purpose of § 6(b) is to put some constraints around disclosure, though not to impose a requirement of absolute accuracy. In discussing § 6(b) and the proposed regulation found in 16 C.F.R. 1101, it is appropriate to ask whether the policies underlying § 6(b) continue to be in the national interest.

4a. Section 6(b) was written ambiguously, and was most assuredly a political compromise of sorts. The Consumer Product Safety Commission did not enjoy an easy birth, and a fair reading of the legislative history would suggest that the lack of clarity inherent in the "reasonable steps" language was not wholly unintentional. During its early years, the ambiguity inherent in § 6(b) was interpreted in favor of disclosure. The Commission responded to information requests by disclosing data in its files without any incidents outside of the *GTE Sylvania* matter. When the Supreme Court resolved the ambiguity surrounding § 6(b), it effectively changed what was a loose congressional policy, and established an unambiguous and inflexible rule of interpretation. Based on case law and the legislative history, the Supreme Court's decision was quite correct, and provided a service that courts historically provide: resolution of legislative uncertainty. The question is whether the Congress is now satisfied with the meaning which has been given to § 6(b).

4b. From a series of fairly plausible hypotheses, the Supreme Court elected a conventional interpretation of § 6(b), which compelled the Commission to articulate precise and expensive steps which will be taken to assure accuracy and otherwise comply with the conditions of 6(b). This is an appropriate time for the Congress to consider whether the policy imposed upon it by the Court is in fact the policy the Congress would like to follow. There are options. First, the Congress could find that § 6(b) requires direct and scientific verification, a step which would be consistent with the position taken by industry, and in excess of the protections suggested in 16 C.F.R. 1101. Second, the Congress could reject the position of the industry, and accept the position articulated in 16 C.F.R. 1101, finding that disclosure can take place within the confines of consumer confirmation coupled with providing manufacturers opportunity for comment. This decision allows for disclosure, although at a fairly high regulatory cost, and for fairness in the process of disclosure. Were the Congress to opt for this, it would be providing industry participants an opportunity for comment which parallels many other types of legal proceedings. Were one to attempt a due process analysis, it is difficult to see how procedural due process requirements would not be met under this scenario posed in 16 C.F.R. 1101. Providing an opportunity for comment, access to files, a right of retraction, and options for judicial relief all seem to be consistent with notions of fairness. Third, the Congress could decide that the values underlying the Supreme Court interpretation of § 6(b) which are imposed on the Consumer Product Safety Commission are not the same values which the Congress had in mind in 1972, 1981 or 1983.

4c. There is nothing within the separation of powers doctrine or other aspects of constitutional law that prohibits the Congress from choosing to follow a course different from that which is set out in the *GTE Sylvania* decision. The decision and the proposed regulations reflect a policy of restrictive disclosure adversely affecting person and interests least capable of otherwise ascertaining critical market information. The *GTE Sylvania* case embodies a notion of market protection and exceeds in a substantial manner the protections due any other entity in any context under FOIA. It unnecessarily supplements open market forces, the law of disparagement, the law of defamation, and other conventional means of protecting product good will. Such protections conceivably could be imposed where an individual industry suffers distinct and discernible obvious adverse market affect through the predictable and constant flow of adverse market information. One is hard pressed, however, to find an example where such protections are simply created for the manufacturing community with no other rationale than the argument that the unsubstantiated risk of isolated inaccuracies is grave.

4d. If a member of Congress is of the opinion that such values seem at odds with his or her beliefs, then reconsideration of § 6(b), including either its repeal or modification, seems appropriate. The Congress could repeal § 6(b) directly and in so doing

render the *GTE Sylvania* case moot. Thereafter, an amendment to the Consumer Products Safety Act could be passed which could define with greater precision the steps to be taken prior to the release of product safety information. This should include a distinction between Commission-initiated data and, by contrast, responses to FOIA requests. The new § 6(b) could insure that FOIA releases make clear that they contain only the conclusions of the authors, and are not endorsed or rejected by the CPSC.

5. Under the present circumstances, a study from the National Institutes of Health might not be released by the Consumer Product Safety Commission, based on one reading of § 6(b), unless the Consumer Product Safety Commission were to conduct further independent investigation or inquiry. To think that the Commission would be compelled to withhold information of this nature from the public on the premise that it might contain some inaccurate or misleading information which might affect a manufacturer seems wholly at odds with congressional policy and intent. If this is a result which has been occasioned by the Supreme Court's interpretation in *GTE Sylvania*, then it is time for Congress to clarify its purposes, and restore to the Commission the duties and obligations which underlie the purpose of the agency. To delay the release of such information is contrary to the public safety, adverse to the interests of those least capable of protecting themselves, and inconsistent with the federal policy regarding information disclosure and open government. This hardly seems the time to impose regulatory burdens, stumbling blocks to the access to information or to require a duplication of research, causing the misallocation of valuable assets.

6. The reasons for repealing § 6(b) include the fact that the Supreme Court has expanded and modified congressional intent to produce disclosure obligations in excess of those intended by the Congress. It is undeniable that § 6(b) causes the disclosure of information to be delayed and, in certain cases, suppressed. The effect of such suppression is to silence the only government agency with the potential to provide a clearinghouse for information regarding dangerous consumer products. Further, the process of continuing research in the product safety area, beyond that which is done by the Commission, often falls on media, public interest groups, universities and research centers. Deprived of the CPSC data, accurate or inaccurate, that it would allow these groups to identify potentially dangerous products, the research process is stalled. It is often necessary for those researching product safety to have access to the full range of complaints, particularly in light of the potential different uses of products.

#### VI. A FIRST AMENDMENT APPROACH TO AMENDING § 6(b)

1. An approach the Congress might take is to view the restrictions imposed in § 6(b) as constraints on the right of persons to receive information. It is perfectly legitimate for the Congress to interpret the Consumer Product Safety Act as, among other things, providing a conduit of information. The commentary from industry and the Commission suggests that data dissemination is a primary function of the agency. From a purely constitutional perspective, the Supreme Court has found that there is a constitutionally protected right to receive information which cannot be impeded by state action. A discussion of those cases follows shortly. The cases define first amendment interests not in terms of the inherent right to communicate, but from the perspective that the recipients have a right to receive information. Accordingly, state statutes which attempted to ban door-to-door solicitation by religious groups were held unconstitutional, not on the basis of religious freedom, but on the first amendment basis that persons within the homes to be solicited had a right to consider and receive the information.

When the government is a conduit of information in the public domain, it cannot impose undue constraints on the dissemination of that data. It is one thing to classify information and restrict access to it because of national security interests or protection of trade secrets. From the constitutional perspective, it is quite different to restrict access to information which has been brought to the public domain simply because one interest group believes that there is a potential for misinterpretation or inaccuracy. Such hesitation was never intended by the authors of the first amendment. The case law on the "right to know" leaves no question that information cannot be suppressed on the premise of potential inaccuracy. The right of the press to gather information or to attend trials, overriding judicial orders to close courtrooms, is a right recognized on the premise that people have the right to receive information and evaluate it for its worth. This right is not premised on the condition that there be an assurance of accuracy in the information, or that the information only be released in such a way as to ensure that it will be interpreted fairly.

The overt and stated purpose of the Consumer Product Safety Commission, by a fair reading of the legislative history, is to provide notice to the public of product defects, and to take affirmative steps if those defects constitute an imminent hazard. Section 6(b) restricts access to data or renders data useless by delay, frustrating the flow of information and subjecting the public to the risks in nondisclosure.

2. The repeal of section 6(b) of the Consumer Product Safety Act would not apply to Commission-initiated and sponsored data and would not mean an end of efforts to assure accuracy. The repeal would allow for the dissemination of information to the weak, the powerless, and the vulnerable.

3. The Congress could choose to modify or repeal § 6(b) because it affects a clear first amendment interest. Although the statute is not facially unconstitutional, it could be interpreted as delaying, and from time to time restricting the availability of data. Because there is little question that the congressional purpose in drafting the statute was to establish a balance in the disclosure of information, a constitutionally permissible balance under the first amendment, the issue becomes more one of degree of impact on information rather than an issue of eliminating information. The constitutional interest, usually characterized as "the right to receive information," is in part jeopardized when an agency is compelled to stop the otherwise beneficial flow of information for reasons of lesser magnitude. Were it true that information disclosures usually resulted in misinformation, and the misinformation usually resulted in harm to manufacturing interests, then the restrictions imposed by § 6(b) would raise fewer constitutional questions. In light of the balancing nature of the first amendment, we expect there to be restrictions on data flow from time to time. In 50,000 requests that were granted in the first seven years of operation of the Commission, however, there were literally no problems with inaccurate information and adverse consumer effects. Therefore, the balancing that is done must take place in a context if the harm of disclosure is put in its appropriate light.

4. To give the harm of disclosure inappropriate and excessive weight in the value calculus underlying § 6(b) begins to threaten a first amendment interest. Indeed, the constitutional characterization most appropriate is one which finds the agency in the delicate position of balancing first amendment interests: a privacy interest on the part of the manufacturer versus a disclosure interest on the part of the public. This is a standard first amendment problem, but one which the Congress must treat with utmost care. The concern of the courts in recent years has given great weight to the notion of a right to receive information and a right to know certain facts. Because the information involved—submissions either in the form of complaints or studies or data otherwise defined by statute—is by and large in the public domain, any constraint on the disclosure of that information tempts the constitutional balancing which the Consumer Product Safety Commission must perform.

5. A recent article in the Yale Law Journal, *The First Amendment Right to Gather State-Held Information* (89 Yale L.J. 923, 939 (1980)), discusses in broad and general policy terms the need to permit acquisition and subsequent dissemination of information without having undue restrictions placed on that process by our governmental system. Predicating the analysis on a historical perspective of the first amendment, the author concludes, "[a] right to gather public information by entering public facilities or by gaining access to public documents should be recognized." *Id.* at 939) The interest involved which is germane to the Congress involves access to public documents, or documents in the public domain. The author of the law review comment urges that to be a matter of constitutional imperative. The case law in the area of right to know, purely from the perspective of analogy, may be useful to review. Again, this review is undertaken to provide the Congress with some information about where first amendment policy regarding access to information. It is hoped that by gaining a sensitivity to the first amendment dynamics regarding information disclosure, the Congress will give serious consideration to modifying § 6(b) so that a scheme can be established which will allow for the expeditious release of documents which are of their own nature valid, and a controlled release for documents which are, of their own nature, potentially suspect. This dichotomy was utilized prior to 1980, and can only be reasserted through constitutional amendment.

6. *Case Material Regarding Constitutional Rights And Interests.*—In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Supreme Court invalidated a provision in a state statute which prohibited Jehovah's Witnesses from distributing literature door-to-door. The Court found that the state could not interfere with the people's right to receive information, deciding the case on the premise that persons were entitled to see the information, evaluate it for its worth, rather than deciding the case on a first amendment, free exercise of religion basis. This right to receive information was made clear and explicit in *Lamont v. Post Master General*, 381 U.S. 301 (1965), in which the Supreme Court found that the federal government, like the



states could not participate in a program which restricted access to otherwise legally available information. In the concurring opinion of Justice Brennan, the idea is made explicit: "I think the right to receive information is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. *It would be a barren marketplace of ideas that only had sellers and no buyers.*" *Id.* at 308, (emphasis added). *City of Struthers* is the first case in which the Supreme Court embraced the notion that people had a right to receive information, regardless of the content of the information. Unless a compelling reason exists to restrict, delay or prohibit the receipt of information, the first amendment compels the government to not restrict the flow of data that is in the public domain. Market research information, technical studies, and letters sent to the Consumer Product Safety Commission are, by definition, in the public domain. Imposing restrictions on their disclosure tempts the principles of these cases.

As with all first amendment interests, a balancing or "qualification" element is present in determining whether to release and provide certain types of communication. One way to read § 6(b) is to say that it established the balancing for this task. Alternatively, one could read § 6(b) as placing an undue constraint on the disclosure of information. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach. . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The notion that consumer information is critical is one well supported by Supreme Court dogma. "[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee . . . it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial . . . ." *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 390 (1969). If there is a willing provider of information and a willing recipient, the scenario under most of the information disclosures at the Consumer Product Safety Commission, the disclosure obligations take on a constitutional gloss. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, *the protection afforded is to the communication, to its source and to its recipient's both.*" *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (emphasis added). In the dialogue familiar to the legal community, the Supreme Court held in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1967), that restrictions on lawyer advertising were unconstitutional, not because of competition interests, but instead because the "listener's interest [in commercial information] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than is concern for urgent political dialogue." Indeed, the Constitutional protections of the first amendment have been extended so far as to allow for the reversal of a conviction of a reporter who inquired into highly confidential judicial misconduct investigations, *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), on the premise that the disclosure of information is in the public interest, and that the interest involved in disclosure of information, even if damaging or personally devastating, is a greater interest than the reputation values involved.

Two final cases bear brief mention. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Supreme Court found that the exclusion of reporters from a criminal trial transgressed the right of the reporters, and correspondingly that of their readers to receive information. The Court did not accept the reporters' argument because this was a controversial murder trial, but because the public has a right to learn about the on-going process of criminal justice, even if the exposure places the trial itself at risk on the grounds that pre-trial publicity would effect the objectivity of jurors. Further, the fact that the accused reputation and acceptance in the community was at stake was a real risk, assuming his innocence, but not of such magnitude as to offset the first amendment values of openness. For the issue before the Committee, the case provides a dramatic parable: risks of destroying a reputation and jeopardizing a trial, with virtually no right of retraction no "injunctive" power, no "pre-release verification", are risks that must be taken due to the magnitude of policy favoring openness and the free flow of ideas. Such proud and well-protected values are threatened when the CPSC is directed, by the *GTE Sylvania* decision, to impose powerful restrictions on the release of valuable information.

Finally, this past term, the Supreme Court decided *Board of Education v. Pico*, 102 S. Ct. 2799 (1982), in which the Court held that it is unconstitutional to remove books from a public school library for the purpose of denying access to ideas. The case is limited to removal, not acquisition, and deals with the unconstitutionality of

imposing a restraint on access to information within the control of a governmental entity. The right to receive information is secured in *Pico*, though in a thoroughly different context than is before this committee. Nevertheless, the protected ideal is similar: "freedom of speech . . . embraces the right to distribute literature, and necessarily protects the right to receive." 102 S. Ct. at 2008, (quoting *Martin v. Struthers* 318 U.S. 141, 1213 (1943)). At the heart of Justice Brennan's opinion is the idea that the right to receive ideas is a necessary precedent to the recipient's meaningful exercise of his own right of speech, press and political freedom. Justice Brennan quoted wisdom two centuries old: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. . . . And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* (quoting 9 writing of James Madison 103 (G. Hunt ed. 1910)) (footnote omitted). The Committee might consider this notion in attempting to resolve the tempest surrounding § 6(b). A statute that prevents the timely release of valuable information must be subjected to piercing scrutiny. The statute should not stand if its effect is to actively compromise the legitimate education, research potential, and safety of our citizenry if the sole risk justifying the restriction is the *potential* that at some future point, a manufacturer *might* have its reputation influenced adversely for a brief moment in time.

Senator KASTEN. Mr. Popper, thank you very much. Unfortunately, a panel that was scheduled to take between 20 and 25 minutes has now taken about 45 minutes, so there will not be an opportunity to answer questions.

Just for the benefit of the panel and the other people, I tried today to not have the bells, the buzzers, the lights, and the other kinds of things that would limit people's time for testimony. The result is that all of us have gone over. The result is there is not time for questions. I want to remind everyone that at least before this subcommittee that the testimony you provide in writing is made part of the record.

I think that in many cases questions and answers and discussion, particularly among members of the panel, are as valuable or may be even more valuable than some of the prepared testimony, but we have run out of time. We do have a number of people who have been sitting here all morning waiting for an opportunity to testify and I would hope that either we will go back to the bells, the buzzers, and the lights, or maybe we can find a way to discipline ourselves better.

But I do thank you all for your testimony and I thank you very much for the quality of the information that you have provided to this committee.

The next panel is Mr. Locker, Mrs. King, Mr. Carey, Mr. Smith, and Dr. Pittle.

STATEMENTS OF AARON LOCKER, REPRESENTING THE U.S. CHAMBER OF COMMERCE; SUSAN KING, FORMER CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION, PRESENTLY DIRECTOR, CONSUMER AFFAIRS DIVISION, CORNING GLASS WORKS; CHARLES CAREY, VICE PRESIDENT, DREXEL HERITAGE FURNISHINGS, INC., COCHAIRMAN, UPHOLSTERED FURNITURE ACTION COUNCIL; J. THOMAS SMITH, MANAGING DIRECTOR AND GENERAL COUNSEL, NATIONAL KEROSENE HEATERS ASSOCIATION; AND DR. DAVID PITTLE, FORMER COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION, PRESENTLY TECHNICAL DIRECTOR, CONSUMERS UNION

Mr. LOCKER. Good morning, Senator Kasten. I am actually a member of the firm of Locker, Greenberg, and Brainin, but I am here to speak on behalf of the U.S. Chamber of Commerce.

In view of your admonition to the prior panel to keep our remarks within the 5-minute slot allocated, I will speak extemporaneously and hope to complete my remarks within 5 minutes. I would welcome questions.

Let me start by saying that the chamber, the foremost business community representative, is not here to bury the Commission. As we testified in the hearings which preceded the Consumer Product Safety Amendments of 1981, we support the continued existence of the Commission. We do however support a 2-year reauthorization so that the very same Commissioners who have appeared today can be brought again before the Senate to account in oversight and reauthorization hearings as they have today.

We support the administration's level of \$32.9 million in funding, and since the prior panel has exhaustively discussed 6(b) I will leave the issue by saying only that we support the continued existence of section 6(b) as it was amended in the Consumer Product Safety Amendments of 1981.

If I am not here to bury the Commission, I am also not here to praise it. I believe the oversight process warrants a review of Commission activities and, if necessary, some critique, especially in the area, Senator, of small business and the grievances it may have as it relates to agency processes.

You have correctly characterized the effect of the amendments in 1981 as evidencing a tilt toward voluntary standards. In fact, the very standards-writing process is replete with the evidence of that preference on the part of the Congress for the voluntary standards process. The extension of the rulemaking process to three stages, requiring an advanced notice of proposed rulemaking, the rigorous requirements for cost-benefit and economic analysis, augmented by a Regulatory Flexibility Act requirement that the special impact of any rule or standard implemented or a ban by the agency on small business must be given very express consideration.

One would have thought that this express directive of the Congress would be heeded. I am not saying that in some cases it has not been, but I have one area to complain of where it has not been. That is the area of toy chests. Although the Commission staff had recommended to the Commission that it begin rulemaking for toy chests in 1973, the Commission did not undertake to develop a vol-



untary standard with the cooperation of industry until, I believe, 1981.

When it was unable to do so, the Toy Manufacturers of America Inc. undertook to pull together a fragmented, noncohesive industry with manufacturers in the juvenile products industry, and the furniture industry, and the toy industry, and even outside those industries, to write a voluntary standard that was identical to the regulation proposed or being drafted by the agency.

In fact, the TMA did succeed during the period between December 1981, when I requested they become actively involved, and March 1982, to write and adopt under the auspices of the ASTM, at least at the committee level, a voluntary standard identical to that being sought by the agency. It then undertook, while the standard was being processed under the procedures of the ASTM, to secure compliance by a fragmented, noncohesive industry with the developed standard, and even before the ASTM procedures have ground out a final standard for formal ASTM adoption, has secured 84-percent industry compliance.

Notwithstanding these efforts in an industry where it did not represent a preponderance, if not a majority, of the manufacturers by volume of toy chests being sold in the United States, the Commission has elected to go forward with the second stage of the rulemaking process and has published a notice of rulemaking after initially publishing the advanced notice of rulemaking.

This has been very discouraging to the toymakers, at least. Priding themselves on their responsibility in the area of voluntary standards, they do not feel that the intention of Congress, evidenced by the amendments of 1981 in the voluntary standards area, has been followed.

Let me put aside voluntary standards for a moment, since I just have a couple of moments left, to speak to another concern of industry, again small manufacturers located in high-unemployment areas, that the very safeguards of the rulemaking process that you have enunciated, as well as the preference for voluntary standards, are not being followed. That is, by the complete abdication of rulemaking in certain areas where industry thinks it is warranted, and instead a tilt by the staff of the Commission to section 15 procedures, seeking substantial hazards determinations and retroactive recall remedies against whole classes of products, which would more ideally be regulated, we feel, by the standards process or the rulemaking process.

A classic example is the manufacture of playpens. A dozen manufacturers are providing perhaps the most successful playpen product—a drop-sided mesh playpen. The hazard associated with it is user failure to fully erect the playpen, leaving a small pouch into which a very young child might fall and injure itself. The labels on the playpens, as they exist today, in the opinion of the Commission staff, are inadequate to fully apprise the public of the danger of leaving the drop side down. The response? Large labels on two sides of the playpen.

The Commission staff, however, has threatened the entire industry and all the manufacturers who have adopted the large, conspicuous label in a voluntary standard, with section 15 redress, with issuance of section 15 complaints, with a retroactive recall,

unless they engage in paid advertising to the tune of about \$150,000 to advise the public of proper usage and the label.

We think that that is an abdication of the express direction of Congress that the issue be dealt with by rule or voluntary standard, or by publicity which by press release, and if necessary, by Commission press conference, which the manufacturers have agreed to do, jointly with the Commission.

Another example is expandable wooden enclosures. The whole industry is being threatened with section 15 adjudicatory proceedings instead of rulemaking, or voluntary standards, to accomplish the purposes and policies expressed in the amendments of 1981. So while many strides have been taken and even achieved in the amendments, the tilt toward voluntary standards or expanded rulemaking is not fully exemplified in the activities of the agency.

Further, we are concerned that in areas classically calling for the application of rulemaking, that is a consideration of a rule or a standard for a whole class of products or for a whole industry, rulemaking, is not being undertaken, voluntary standards are not being explored, and in lieu thereof section 15 adjudicative recall action is being urged against a whole class of products.

The last example is baby squeeze toys. These items—toys that make noise when squeezed; commonly found in the crib—were expressly excluded from a rule adopted by the Commission for impaction hazards and applied solely to rattles. It would have been easy under the circumstances to expand the rule. Instead the Commission staff after, I think improperly, using the requirements of the rule (which exclude their applicability to squeeze toys, the class of products involved) to screen them, and is now taking steps under section 15 to achieve a retroactive recall of these products.

These are abuses. There are others, but I think I have exceeded my 5 minutes, and I would be willing to answer any questions you might have with reference to them.

[The following information was subsequently received for the record:]

LOCKER GREENBERG & BRAININ, P.C.,  
ATTORNEYS AT LAW,  
New York, N.Y., March 14, 1983.

Senator ROBERT W. KASTEN, Jr.,  
Chairman, Consumer Subcommittee, U.S. Senate, Committee on Commerce, Science  
and Transportation, Washington, D.C.

DEAR SENATOR KASTEN: I acknowledge your letter of March 3, 1983, and am pleased to forward my response to the questions contained therein.

Question 1. The Consumer Product Safety Act amendments of 1981 created new standards for regulations by requiring that the Commission consider the benefit vs. burden ratio of a proposed rule and also alternatives of voluntary industry regulation. However, in a manner which we think was not contemplated by Congress, the pragmatic result of such amendments is that the Commission has deemphasized its rulemaking function, and perhaps circumvented the new standards, by increasingly pursuing adjudicative activities under Section 15.

This proclivity to choose adjudicative action over rulemaking even where the regulation of entire industries and generic products are involved, is especially apparent with respect to children's products. In recent months, the Commission has chosen to act through Section 15 in the generic industrywide regulation of mesh drop-side playyards, portable mesh cribs, squeeze toys and expandable wooden enclosures. In the area of squeeze toys, for example, the Commission has gone as far as developing in-house testing procedures, which serve as a basis for enforcement proceedings, without an opportunity for notice to or comment from consumers, consumer groups, pediatric professionals and industry that otherwise would be available in rulemak-

ing. In regard to mesh drop-side playyards, portable mesh cribs and expandable wooden enclosures, the Commission has forsaken voluntary action and has chosen instead the Section 15 route. All of these areas involve generic problems which could have been dealt with more effectively and fairly through rulemaking.

*Question 2.* The Commission could greatly encourage the use of voluntary remedies by placing reliance on them in several regulatory matters currently before it. Industry has not yet ascertained that the considerable effort needed to develop effective voluntary standards would receive more than the Commission's frequently demonstrated cool reception of those efforts as in the past. An example can be found in the case of toy chests. Considering the structure of the industry, although the Toy Manufacturers of America (TMA) moved as quickly as possible to develop a voluntary toy chest standard meeting all of the Commission's criteria, and although 84% compliance has been indicated even before the standard goes into effect, the Commission nonetheless decided to go forward with a mandatory rule instead of placing reliance on the voluntary standard. Similarly, although industry has already adopted a voluntary standard dealing with the alleged hazards inherent in using mesh drop-side playyards and portable mesh cribs, the Commission's staff has nevertheless sought Section 15 action. In the areas of squeeze toys and expandable enclosures, the Commission's staff has also sought Section 15 action although industry is presently developing voluntary standards addressing the hazards alleged to be present. This rejection of sincere voluntary efforts tends to create an adversarial relationship and dampen industry's willingness to undertake future voluntary actions to develop standards.

*Question 3.* On balance, I do not believe that the voluntary system requires any longer to develop a standard than the Commission's procedures for the adoption of a standard through rulemaking. In the case of toy chests, the Commission has accused industry of dragging its feet. However, after the Commission was unable to develop a voluntary standard with broad-scale industry participation, the Toy Manufacturers of America ("TMA"), in December of 1981, offered to develop a toy chest standard, prepared it and had it adopted at the Committee level by March of 1982. Furthermore, TMA recently was able to obtain assurance of 84% compliance with the standard and expects 100% compliance before formal adoption of the standard by ASTM.

*Question 4.* Prior to 1981 the Commission rejected voluntary standards when it promulgated regulations for bicycles and walk-behind power lawn mowers. More recently, the Commission has acted to issue a final safety standard without deferring to voluntary standards in the areas of wood and coal stoves and toy chests. The Commission is currently considering a final rule for wood and coal stoves although a voluntary standard deals with the risk of injury alleged to be present. In addition, as indicated above, notwithstanding the existence of a voluntary standard for toy chests adopted by ASTM Committee, the Commission has gone forward with advanced notice of rulemaking and second stage notice of rulemaking and, thus far, evidences every intention of adopting a mandatory rule.

*Question 5.* There is no way to guarantee 100% compliance with any standard whether it be voluntary or mandatory. Small "mom and pop" retail stores and small manufacturers are often unaware of their obligations under Federal law and rules, as well as voluntary standards. However, using the toy chest industry as an example, TMA has contacted each manufacturer in the fragmented industry and will survey compliance with the standard. TMA has received assurance of 84% compliance with the standard even before it is finally promulgated and is currently conducting a survey to obtain a pledge of compliance from all the manufacturers.

*Questions for the Record from the Minority.*—As I have indicated above, there are several examples of Section 15 action being taken by the Commission and its staff in lieu of soliciting voluntary standards or proceedings by rulemaking. In the areas of mesh drop-side playyards, portable mesh cribs, squeeze toys and expandable wooden enclosures, the Commission's staff has chosen to regulate entire industries via Section 15 instead of through rulemaking or voluntary action. In each instance, voluntary action was either already adopted or in the process of being developed, and was rejected in favor of further action under Section 15. In each instance, the alleged problem involved the generic design of most or all of the products in the area, which could have been more appropriately and fairly dealt with by voluntary standards or rulemaking.

I hope this answers the questions raised in your letter to me. If you have any further questions or wish more background information, I would be pleased to submit it.

Very truly yours,

AARON LOCKER.



Senator KASTEN. Thank you, Mr. Locker. The next witness is Susan King, who is a former Chairman of the Consumer Product Safety Commission, now representing the Consumer Affairs Division of the Corning Glass Works.

Ms. KING. Thank you very much, Mr. Chairman.

During my tenure at the CPSC I had occasion to work very closely with the Commerce Committee, and I think that this subcommittee has always held the best oversight hearings of any that I have ever seen.

Senator KASTEN. Is it because this Commission is such a controversial agency.

Ms. KING. That is true, but you have always done a very good job of putting together an indepth investigation and hearing a lot of witnesses. You have obviously done that again today, and I would like to compliment the subcommittee and the staff on an excellent job. You do have time constraints. I will try to be very brief by going through an abbreviated portion of my formal testimony.

I would like to talk very briefly about three specific things: first, the importance of the role of the CPSC in product safety generally; second, my concern that reduced resources will undermine eventually the technical expertise of the Commission upon which all of its work basically depends; third, my related concerns about section 6(b), section 15, and the consumer education programs as they may affect the Commission's credibility in the future.

Let me say that I personally support multiyear reauthorization, 5-year reauthorization of an independent commission. Corning Glass Works has also supported and worked closely with the Commission for many, many years. Corning, as you know, is a consumer oriented company very proud of its reputation, and I think that it is only one of many respected companies in this country who have supported the continued existence of the CPSC.

The consumers of America obviously agree. I missed the early part of your hearings this morning because I was on an airplane, but I have no doubt that the Harris poll of last week was much discussed. I think it is an important poll. I will not comment further on that other than to say that it is clear that consumers do not want to see any weakening of health, safety, environmental, and consumer protection regulations, and to note that the CPSC got a very favorable rating in the course of that poll, comparable to the rating it had received in 1976.

I think a lot has happened in the last 10 years in the whole area of consumerism. Clearly consumer safety awareness is higher. Business and industry awareness is higher. I think manufacturers pay more attention to safety issues now than they have in the past. Many products are in fact a great deal safer, and, in those cases where problems are discovered, companies have systems in place that did not exist 10 years ago to address those problems.

CPSC can claim some of the credit for these advances. The issue now is a little different than it was 10 years ago when the Commission was created. We are facing the realization that we are not dealing with limitless resources as we have in the past. The question of how to target and use the limited resources that are available to the Commission is the question that is really before the Commission and the Congress today.

CPSC, as you know, has always been a very small agency with a big mandate. The question of technical expertise and technical and scientific capabilities is especially critical here. Ultimately, the effectiveness of the agency rests on a combination of legal authority, sound technical expertise, and credibility.

I do not think the first element, legal authority, is at issue. As I have noted, my own concern lies with the latter two, those of expertise and credibility.

During my tenure as Chairman of the CPSC our budget ranged between \$42 and \$45 million and we had a staff level of approximately 900. Recent budget cuts and personnel reductions have taken a severe toll on the Commission. You have undoubtedly heard a great deal of detail about that this morning. I am sure you are aware of the GAO study which states that CPSC's technical and scientific staff has been reduced by more than 32 percent between October 1979 and December 1981. The toll may be greater by now.

Enforcement staffing is down by at least 20 percent, half of the field offices have been eliminated, research contracts have been significantly reduced or delayed. If the trend continues, the Commission cannot hope to maintain state-of-the-art information or technical competence in a host of complex areas. No matter where one stands on the question of voluntary standards versus actual regulation by formal, mandatory standards, I think everyone would agree that product safety in general is not enhanced by, and may in fact even be impeded by, an agency that is less than up-to-date on the scientific and technical information.

The Commission, for its part, facing these reduced resources, can respond by paring all nonessential functions to the bone and deploying all these resources to the basic engineering, scientific, economic, and legal analysis that is the foundation of the agency's work. I would very much encourage the Commission to do so. However, this is obviously only a stopgap measure and the only longrun answer lies with Congress.

On the point of Commission credibility, the Product Safety Act vests the Commission with a range of legal rules to prod and assist and compel action on safety-related matters where necessary. In the last analysis, however, much of the success of the statutory system depends on industry's self-regulation and voluntary compliance.

Self-regulation, in turn, depends in no small measure on the credibility of the CPSC—its technical work, its legal powers, the general professionalism with which it identifies problems and approaches solutions. Viewing this from the industry side of the fence for a time now I have no qualms about saying that respect for authority is a much more powerful motivator than perceived fear in this whole area of safety regulation.

While there is a desire on the part of businesses to maintain a certain distance from the Commission, most are willing to cooperate with the agency. What the manufacturers and retailers want for their part is some assurance that the Commission acts in a fair and responsible manner with consistency and evenhandedness and, above all, with professional and technical competence. Otherwise,

the willingness of people to come forward voluntarily rapidly diminishes.

I think this may be the basic issue which underlies the controversy over the public disclosure provisions of section 6(b). I personally would prefer to see conflict between the Freedom of Information Act and 6(b) resolved in favor of public access to information.

I would say, however, that I do understand the real concern among many companies that the Commission may not fully appreciate the importance of confidential business information or fully understand the unwarranted damage that can be done by the release of unverified consumer complaints, which may sometimes contain incomplete, erroneous, or misleading information.

It is a very tough question. I hope the subcommittee can find a way to balance these two difficult interests.

A similar concern about the Commission not always carefully discriminating among most serious, less serious, and least serious hazards may be responsible in some measure for the decline in section 15 substantial product hazards reports. I do not think anyone would disagree that it is in everybody's best interest for companies to inform the CPSC of possible problems, including those which do not constitute a substantial product hazard.

On the other hand, if a company fears that a section 15 or a lesser report might become a vehicle for CPSC publicity rather than product safety, if it fears that the Commission might overreact, treating a minor problem as a major problem, or if it fears that it might in certain instances be seized upon just to make an example to the rest of the industry, its good faith intentions may be cooled rapidly.

None of us like to talk about it very much, but it seems clear to me that companies might choose to risk the legal consequences of not reporting, even if they have a section 15, if they believe that the publicity damage and economic costs of a report outweigh the penalty of not reporting to the Commission.

Let me touch briefly on another issue that troubles me and, I think, has some bearing on the broader scope of Commission credibility for the future. That is the current emphasis on consumer information and education programs. This is very alluring because I&E programs allow sidestepping of some of the more difficult and demanding questions of whether a product might be made more safe from the beginning.

I believe that this is the baseline question where the Commission must begin, whether or not consumer misuse of a product or some aspect of consumer behavior is involved. It is a hard question. But it takes longer to change consumer behavior, if it is possible at all.

I would suggest that it is important to resist the temptation to throw an information program at every product or every injury problem. At a minimum, the Commission should scrutinize the issues very carefully in order to set priorities. The criteria that might be applied are the same as those statutory criteria for the standard setting process: Assessing the nature and degree of the risk, the harm, the population exposed, and, most importantly, the potential effectiveness of an information program to in fact reduce the risk. Otherwise, over the long term, a great deal of time,



money, and energy can be expended in a scattershot approach that really has little impact on product safety.

I will sum up by just repeating my basic point. It is simply this. The interest of the Government, industry, and the public in product safety is best served by good hazard information, real product expertise, and sound technical analysis of all remedial options.

As I said, I know from my own experience that the business community is very respectful of the power of the CPSC. If the the Commission can be adequately funded and its authority used wisely, judiciously, and fairly, the CPSC can benefit all of us as consumers. The CPSC can also be a very forceful partner for those in business who want to make product safety as high a priority as the Commission does and who in fact view product safety as smart business. We approach an important historical point on this 10th anniversary of the Commission, and I urge you to strongly support a multiyear reauthorization and help obtain adequate funds for the Commission to do its proper job.

[The statement follows:]

STATEMENT OF SUSAN B. KING, DIRECTOR OF CONSUMER AFFAIRS, CONSUMER PRODUCTS DIVISION, CORNING GLASS WORKS

Chairman Kasten and Members of the Subcommittee: My name is Susan Bennett King, and I am currently Director of Consumer Affairs for Corning Glass Works' Consumer Division. Prior to this, from 1978 Until January 1981, I served as Chairman of the Consumer Product Safety Commission.

During my tenure at CPSC, I had the pleasure of working very closely with the members and staff of this Subcommittee. The Subcommittee has always been unusually thorough and probing in carrying out its oversight and authorization responsibilities. You have again undertaken an in-depth inquiry, and I am pleased to be a part of that process here today.

I will try to be brief because you have had a very full agenda. I want to touch on only a few specific issues.

First, the importance of the role of the CPSC in product safety.

Second, my concern that reduced resources will undermine the technical expertise essential to meaningful CPSC work.

Third, related concerns about 6(b), Section 15 and consumer education programs as they affect Commission credibility.

CPSC SUPPORT

Let me say at the outset that I believe the reasons Congress created the CPSC remain as valid today as they were when the Consumer Product Safety Act was passed in 1972. For this reason, I personally support multi-year reauthorization of an independent CPSC, and I hope you will help assure the CPSC adequate funding and personnel to do its proper job.

Corning Glass Works has also supported and worked closely with the Commission for many years. Corning is a consumer-oriented company that is proud of its own long tradition of high quality products and excellent consumer service. As such, it is only one of the country's many well-respected companies which believe that a governmental product safety presence is beneficial both to consumers and to the marketplace. That is one reason why the focus of these hearings is the size, shape, and direction of the CPSC in the future, not whether there should be a CPSC in 1984 and beyond.

The consumers of America obviously agree. The national poll conducted by the Harris organization for Arco Petroleum, which received so much publicity when it was released last week,<sup>1</sup> makes it clear, once again, that Americans do not want any lessening of governmental health, safety, or consumer protection standards. If anything, the public supports stronger health and safety regulation. It is particularly noteworthy that, on the eve of these hearings, this poll found the CPSC to be the

<sup>1</sup> New York Times, February 17, 1983, p. A-16.

only government agency to receive a clearly positive rating on protecting the consumer.

We have seen the consumer landscape change a great deal in the last ten to twenty years. The trends noted by Harris and others by and large are encouraging. Few would disagree, for example, that:

Consumer awareness of product safety, in general, has risen and purchasing decisions are more often influenced by safety considerations;

Business and industry concern for and attention to safety issues has increased;

Many products are, in fact, safer; and,

In those cases where problems are discovered, companies now have systems in place to help them identify and address problems via a range of remedial options. (The product recall, once unusual, is now common. While often painful and expensive for the initiator, it is accepted as the action of a responsible company, not the stigma of a lax manufacturer or retailer.)

The Commission was not without its problems in its early years, but it has been a major force in these consumer protection advances. As the CPSC enters its second decade as an established, mature organization, the issue it faces are somewhat different. Chief among these is the recognition that here, as elsewhere, we are no longer dealing with seemingly limitless resources, either public or private. How to apportion and target these resources with greatest effect to reduce the toll of product-related injury, illness, and death is the question this Committee and others in Congress have to address.

#### AGENCY RESOURCES AND EXPERTISE

The CPSC has always been a small agency with a big mandate. It has jurisdiction over some ten to fifteen thousand categories of consumer products and hundreds of thousands manufacturers, wholesalers, distributors, and retailers.

Ultimately the effectiveness of the CPSC, as with any regulatory body, rests on a combination of legal authority, sound technical expertise, and credibility—credibility with Congress, the regulated industries and the general public. The first element is not at issue. The Commission has far-reaching legal powers, too far-reaching according to some.

My own concern lies with the latter two—expertise and credibility.

During my tenure as Chairman, the Commission budget ranged between \$42 and \$45 million. We operated with a staff of approximately 900. Since then, CPSC has faced budget and staffing cuts larger than any other health and safety agency, with further reductions in the offing. As critics well know, it is politically easier to take a scalpel than a sledgehammer to a popular program. The results can be just as damaging.

Recent budget cuts and personnel reductions have taken a severe toll on the Commission. As I am sure you know, a General Accounting Office study concluded that CPSC's technical and scientific staff had been reduced by more than 32 percent between 1979 and December 1981. The total may be greater by now. Enforcement staffing is down by at least 20 percent. Many field offices have been eliminated or reduced. Research contracts have been significantly reduced or delayed.

If this trend continues, the Commission cannot hope to maintain state-of-the-art information or technical competence in a host of complex areas—such as chemical hazards, fire prevention, and toy safety—with thousands of new products being introduced each year. And no matter where one stands on the perennial regulatory argument of mandatory standards versus voluntary cooperation, it is obvious that product safety is not enhanced (and may even be impeded) by a less than up-to-date government agency.

The Commission, for its part, can respond by paring all non-essential functions to the bone and redeploying these funds to the basic engineering, scientific, economic, and legal analysis that is the foundation of all the agency's work. I would encourage the Commission to do so. However, this can be only a stopgap measure. In the long run it will take action by the Congress, via the reauthorization and appropriations process, and considerably more support from the Administration than has been evident to date, to ensure that the expertise built over the last ten years is not permanently eroded.

#### COMMISSION CREDIBILITY

As the Subcommittee is well aware, the CPSC vests the Commission with a wide range of legal tools with which to prod, assist, encourage, and, where necessary, to compel action on product-related safety matters. In the last analysis, however, much of the success of the statutory system really depends on industry self-regulation and

voluntary compliance, particularly standards setting and the reporting requirements of Section 15.

Self-regulation, in turn, depends in no small measure on the credibility of the CPSC—the soundness and accuracy of its technical work, its willingness and ability to effectively use its considerable legal powers, and the general professionalism with which it identifies problems and approaches solutions. In this context, respect for authority may be a more powerful motivator to industry than fear.

While there is a desire to maintain a certain distance, which is both understandable and probably appropriate, I think most businesses are willing to cooperate with the CPSC to promote product safety objectives. What the manufacturers and retailers want, for their part, is some assurance that the Commission acts in a fair and responsible manner, with consistency and evenhandedness, and, above all, with professional and technical competence. Otherwise, the willingness of most to come forward voluntarily, to work with the Commission for whatever reason, rapidly diminishes.

I believe it is this basic issue which underlies the current controversy over the public disclosure provisions of section 6(b). I personally would prefer to see a conflict between FOIA and 6(b) resolved in favor of public access to information. There is, however, a very real concern among many companies that the Commission may not fully appreciate the importance of confidential business information or fully understand the unwarranted damage that can be done by the release of unverified consumer complaints which may sometimes contain incomplete, erroneous, or misleading information. I hope the Subcommittee can help resolve this question in a way which provides the public with useful information and at the same time provides some reasonable protection for the business world.

A similar concern may be responsible in some measure for the decline in Section 15 substantial product hazard reports. It is in everyone's interest for companies to inform the CPSC of possible problems, including those which do not constitute a "substantial product hazard."

If a company fears that its Section 15 or lesser report might be a vehicle as much for publicity as for product safety, if that fears serious overreaction on the part of the Commission, if it fears that it might be seized upon to "make an example" for the rest of industry (as a CPSC person was recently quoted), its good faith intentions may be rapidly cooled. A company may even choose to risk the legal consequences of not reporting what is an obvious substantial hazard, concluding that the risk of reporting is greater.

There is another issue which troubles me and which has some bearing on the broader scope of Commission credibility. That is the current emphasis on consumer information and education programs. It is very alluring, because it allows sidestepping of the more difficult and demanding questions of whether a product might possibly be made to more safe in the beginning. This is the baseline question, whether or not consumer behavior, or product misuse or abuse, is a factor.

Changing human behavior is a long-time and a some-time process at best. I would suggest that it is important to resist the temptation to toss an information program at every product or injury problem. At a minimum, the Commission should scrutinize these programs carefully and set priorities. The criteria to apply should be the same as those applied in the standards development process: the degree and nature of the risk, the likelihood of harm, the population exposed, and the potential effectiveness such a program in reducing the product hazard or the consumer risk. Otherwise, over the long term, a great deal of time, money, and energy can be expended in a scattershot approach that has little real impact on product safety.

In closing, let me return to my basic point. It is simply this: the governmental, industry, and public interests in product safety are best served by good hazard information, product expertise, and sound technical analysis of all remedial options.

I know from my own experience in government and in the private sector that the business community is very respectful of the power of the CPSC. Adequately funded, with its authority used wisely, judiciously, and fairly, the CPSC can benefit all of us as consumers. The Commission can also be a forceful partner for the many company executives, designers, engineers, production workers, and retail sales people who see product safety as smart business and who want to make it as high a priority as the CPSC does.

This is a critical juncture for the Consumer Product Safety Commission. This Committee and others in Congress can help provide needed resources, support, and direction in the coming weeks as this legislation and the appropriations bills are considered.



[The following information was subsequently received for the record:]

#### QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

*Question 1.* How effective do you think the commission is at this time in accomplishing its objective of improving the safety of consumers?

Answer. There are two ways to improve consumer safety; the first is by the manufacture of safer products, and the second is by teaching and encouraging the safer use of products by consumers themselves. While the large number of variables and unknowns involved make absolute measurement of "safety" quite difficult, there is little disagreement that both producers and users of consumer products pay much more attention to issues of product safety than they did a decade ago. The creation of the CPSC and the various activities undertaken by the agency since then are a major reason for this heightened awareness. It is my view that the far more cost-effective approach to product safety lies in efforts to encourage, assist, and, where necessary, compel attention to and observance of at least minimum safety standards during the design and manufacturing process. This is particularly true with regard to "latent" or unknown safety hazards (such as toxic chemicals) or other hazards (such as chainsaw "kickback") that even the most informed consumer is not able to address. The CPSC has been effective in identifying and addressing many such issues and in seeking remedies through mandatory standards or labels, voluntary standards activities with industry groups, Section 15 actions and other legal means. To the extent that further budget and staff reductions translate into reduced technical and scientific groundwork, effectiveness in encouraging the manufacturing of safe products will be diminished. There is a role for consumer education, but it is complementary to the primary objective of the agency and the statute. Undue reliance on programs designed to change consumer behavior will in the future reduce the effectiveness of the CPSC in overall consumer protection.

*Question 2.* If future cuts are to be made in agency budget, where would you suggest the agency make those cuts?

Answer. Non-essential, non-technical staff positions and expenditures should be held to a minimum and these resources redeployed to the technical and scientific work that provides the basic expertise of the agency. Public relations, communications, telephone, travel, printing, etc. are costly activities and may in fact help create public expectations the agency cannot meet. At a time of severe resource constraints, this can only exacerbate the problem.

*Question 3.* Are there cuts that you would restore, within the agency's current budget restraints?

Answer. Yes—research contract funds for indoor air quality, potentially hazardous dyes, chemical sensitizers, electrical hazards. If the proposed cuts for fire research by the National Bureau of Standards are implemented, this will create another major research void for the CPSC.

*Question 4.* The recent Harris Poll showed the CPSC to be the only Federal agency rated positively by consumers. What would you suggest the agency do to continue the trend of consumer approval? To what do you attribute that rating?

Answer. I would attribute the positive response at least in part to the fact that there has not been any major controversy over CPSC or product-safety issues in recent years (cf. the TRIS issue earlier, EPA and FTC publicity recently) and general consumer familiarity with and understanding of the basic mission of the agency. (In particular, the government has not done a very effective job of explaining the complexities of chemical toxicity, animal testing as a human indicator, the impact of competition on consumer prices, etc. The safety of children's toys and home fire hazards, on the other hand, are well understood issues.) To maintain high public approval, CPSC's work must continue to make sense to the consumer/taxpayer. On the other hand, it should be noted that public controversy, and some negative response to publicity, does not always mean that an agency is not being effective or doing its job. It may indicate that it has taken on some very difficult questions on which there are legitimate differences of opinion.

*Question 5.* The Commission has recently relied more and more on corrective action plans to increase the safety of consumer products. Do you approve of this approach? Why or why not?

Answer. Section 15 Corrective Action Plans are a very important aspect of the CPSC's work. These are designed to address product- or manufacturer-specific problems in a speedy fashion, and in this way are cost-effective ways to protect the consumer and industry. As investigative, data gathering and enforcement activities have been curtailed, the agency has also looked increasingly to Section 15 to main-

tain an enforcement presence in the marketplace. The agency should be cautious to avoid over-reliance on Section 15 in two respects. First, Section 15 actions, however broadly defined, are inappropriate as a substitute for generic rule making and should not be used in an effort to address industry wide problems. Second, even the most vigorous Section 15 program cannot assure compliance with existing rules and regulations that are not monitored or enforced in the field.

*Question 6.* Do you have any recommendations for improvements in the CPSC's section 15 activities?

*Answer.* I would make two suggestions. Both are predicated on the assumption that it is in the long range interest of all concerned for manufacturers, wholesalers, distributors and retailers to voluntarily report possible product problems, even those which legally or technically do not constitute a potential "substantial product hazard" under the Act. The first is for the Commission to clarify and make widely available the policy and operational guidelines for assessing potential hazards reported to the agency, categorizing these according to degree of seriousness, and defining the type and range of remedial program that would be deemed appropriate in the various categories. The second is for the Commission to adhere to these guidelines as closely as possible. In some cases this means exercising considerable self-restraint given the other factors that may be involved, such as the high visibility of a product and major press interest, the past record of the reporting company, the desire to "send a message" to the rest of industry, etc. In the long run, however, the effectiveness of any statutory system dependent on industry self-policing and self-reporting turns on the ability of the enforcing agency to assure clear rules and even-handed application of those rules. Most companies will comply with the requirements of the Act in the case of a clear Section 15 problem. In the case of a less clear issue (probably much more frequent than the obvious substantial hazard), the risks and costs calculated in determining whether or not to take a potential problem to the CPSC must include a worst case assessment of the uncertainties—and common sense indicates that the greater the uncertainties in terms of expense, time, adverse publicity, "unwarranted" over-reaction, etc., the more the scale tips toward a decision not to report. As the risk of independent CPSC investigation declines as well, the argument for not reporting is further strengthened. In this context, it may be useful to explore the possibility of providing guidance to businesses, by way of formal or informal advisory opinions, for example, to introduce greater certainty into the process and thereby encourage more reporting and greater cooperation in the corrective action plan area.

*Question 7.* In your opinion, what is "adequate" funding?

*Answer.* CPSC's budget during my tenure was between \$41 and \$45 million. The real impact of the recent budget reductions is not so much on current operations as on future work. As contracts are cancelled, research delayed or deferred, and existing project curtailed, it is the engineering and scientific basis for future work that is affected. I suggest that at a minimum an adequate budget for fiscal year 1984 is the \$35 million requested by the Commissioners in appearing before the House Appropriations Subcommittee.

*Question 8.* What reasonable steps should be taken by the agency before release of consumer complaints?

*Answer.* The CPSC should make every consumer complaint available to the manufacturer or retailer and a reasonable time provided to look into the matter and respond. (This may often take more than several weeks due to the imprecise nature of many complaints, the recording of incorrect addresses and/or names, the lack of specific product identification, etc.) No consumer complaint should be released with the name of the company or product without a prominent stamp on the document noting that it has been received and filed for informational purposes only and has not been investigated or in any way verified by the government, and accompanied by a CPSC letterhead memo to this effect as well as any response or comment received from the company. A company should not be penalized in any way for failure to respond to the CPSC since the implication is that it did not wish or care to pursue the matter when in fact the issue may have been previously settled with the consumer directly, may be in the process of investigation, may be too lacking in information to pursue, too old, etc. While follow-up letters from the Commission to the complainant might often produce useful information, I suggest that this procedure as proposed in the pending regulations as a "verification" process does not serve to verify the accuracy of the information in the complaint but only the existence of the complaint.

It may well be that the controversy over consumer complaint handling has become the symbol of larger issues rather than the substance of the policy disagreement. The basic question is the fundamental conflict between the FOIA principles of

openness and the protection accorded industry under Section 6(b) of the Act. If Congress does intend to apply a different and far stricter set of rules to the CPSC than those governing other federal agencies, the agency needs clear direction from Congress as to how to establish an acceptable system to meet these requirements without crippling budgetary and paperwork demands. Real industry concern, on the other hand, seems to lie less with the consumer complaint issue than with the "exceptions" of the proposed 6(b) rules (e.g., petitions), and with the possibility of accidental or unauthorized release of 6(b) material regardless of the statutory and/or procedural framework. Whether warranted or not, many companies fear the misuse or abuse of the consumer complaint file for unfair competitive or harassment purposes. Only very careful in-house controls imposed by the Commission can address this latter concern. (It should be noted that I am here expressing my own personal views, not those of Corning Glass Works. Corning's General Counsel filed comments on the proposed 6(b) rules with the Commission earlier, objecting to the rules as inconsistent with the spirit and letter of the 6(b) language.)

*Question 9.* Do you believe funds for I&E should be diverted elsewhere? If yes, where would you suggest?

*Answer.* Information and education programs are a supplement to, not a replacement for, hazard data, product research, compliance and enforcement. Engineering work, health sciences research, epidemiology and human factors research take first priority. Economic analysis, legal interpretation, market research and related activities are necessary support functions. Without a sound technical and scientific base, it will become increasingly difficult to develop information and education programs of any real substance. As I noted in testimony before the Subcommittee, the authority and credibility of the agency in the long run depends on its engineering, scientific and legal expertise.

Senator KASTEN. Mr. Charles Carey, representing the Upholstered Furniture Action Council. Mr. Carey.

Mr. CAREY. Mr. Chairman, I can also promise you a shortened version of my original presentation. My name is Charles Carey. I am vice president of Drexel Heritage Furnishings, headquartered in Drexel, N.C. I am pleased to have the opportunity to appear before your subcommittee representing the Upholstered Furniture Action Council, UFAC, an association of furniture manufacturers, retailers, and supplier.

UFAC was organized for the purpose of conducting research into more cigarette-resistant upholstering methods and implementing them throughout the industry. I will soon be starting my third year as cochairman of UFAC.

Upholstered furniture flammability was recognized as a national issue in 1967 when Congress amended the 1952 Flammable Fabrics Act to include interior household furnishing. Jurisdiction over the Flammable Fabrics Act was moved from the Department of Commerce, which published a finding of possible need for upholstered furniture flammability regulation to the newly formed Consumer Product Safety Commission, which in 1976 drafted but never formally issued a proposed mandatory standard for upholstered furniture flammability.

The CPSC's proposed standard was deemed unsuitable by furniture manufacturers for several reasons. The mandatory standard would have reduced the consumers' choice of fabrics. The standard would have significantly increased the cost of upholstered furniture to the consumer. It would have threatened the existence of many small manufacturers, all with no certainty that the mandatory regulation would have resulted in adequate protection for the consumer.

Concern over the Federal activities, the furniture industry formally launched the Upholstered Furniture Action Council in 1973,



a voluntary industry program to reduce the risk of upholstered furniture fires through a more cost-effective and technologically feasible approach. The UFAC program is based upon extensive research and testing, full participation by the industry, and construction criteria to reflect improved technology and consumer education and information.

Over 88 percent of the upholstered furniture producers in the United States today are committed to the UFAC program. UFAC criteria have altered the construction of upholstered furniture and we have reached a countless number of consumers with the UFAC safety message.

On October 21, 1981, the Consumer Product Safety Commission unanimously agreed to defer further regulatory action and instead involved the agency in a cooperative working relationship with us. Pursuant to that decision, UFAC's technical committee meetings were open to the CPSC, allowing a vital information exchange in the areas of research and testing.

We are currently producing an audiovisual presentation to be used in enhancing our manufacturer and retail commitments to the program. Our recent technological breakthroughs, the heat-conducting welt cord, and the use of smolder-resistant interior fabrics are expected to be incorporated in furniture produced and shipped to manufacturers after July 1, 1983. We look forward to CPSC's continued assistance in and support for these activities.

Regarding the reauthorization for the CPSC, the 1981 approved CPSC charter has resulted in improved procedures employed at the agency. UFAC would urge Congress not to take any action which could result in a weakening of the 1981 reforms to the Consumer Product Safety Act and Transferred Acts.

Mr. Chairman, I appreciate the opportunity to appear before you today. Attached to my statement to be included in the record is a copy of UFAC's most recent publication, "An Ounce of Prevention," outlining more specifically the history of UFAC and the recent activities in the flammability area.<sup>1</sup>

I will be happy to answer any questions you may have.

[The statement follows:]

STATEMENT OF CHARLES M. CAREY, COCHAIRMAN, UPHOLSTERED FURNITURE ACTION COUNCIL

Mr. Chairman, my name is Charles Carey, and I am Vice President, Drexel Heritage Furnishings Inc., headquartered in Drexel, North Carolina. Today, I am pleased to have the opportunity to appear before your subcommittee, representing the Upholstered Furniture Action Council (UFAC), an association of furniture manufacturers, retailers, and suppliers.

UFAC was organized for the purpose of conducting research into more cigarette-resistant upholstering methods and implementing them throughout the industry. I will soon be starting my third years as co-chairman of UFAC, having previously served for six years on the UFAC Board of Directors.

By way of background, upholstered furniture flammability was recognized in 1967 as a national issue, when Congress amended the 1952 Flammable Fabrics Act to include interior household furnishings which may constitute an "unreasonable flammability risk" to the American public. Soon after this law was passed, both industry and government set about devising an approach to reducing the risk of upholstered furniture fires. Jurisdiction over the Flammable Fabrics Act was moved from the Department of Commerce (DOC), which published a "finding of possible need" for

<sup>1</sup> The material referred to has been retained in the committee files.

upholstered furniture flammability regulation, to the newly-formed Consumer Product Safety Commission (CPSC), which in 1976, drafted—but never formally issued—a proposed mandatory standard for upholstered furniture flammability.

The CPSC's proposed standard was deemed unsuitable by furniture manufacturers for several reasons. First of all, the mandatory standard would have reduced consumer choice of fabrics, virtually eliminating such popular upholstering materials as cotton, linen, and rayon. Secondly, the standard would have significantly increased the cost of upholstered furniture to the consumer (20-60 percent by the agency's estimates). Finally, it would have threatened the existence of many small manufacturers who simply could not bear sudden increases in production costs or would not have been equipped to handle testing requirements. Also, at the time this proposal was drafted, there was no certainty that the mandatory regulation would have resulted in adequate protection for the consumer.

Concerned over the direction the federal government was headed in the regulation of our product, the furniture industry formally launched the Upholstered Furniture Act Council (UFAC) in 1973, to develop and implement a voluntary industry program to reduce the risk of upholstered furniture fires through a more cost-effective and technologically feasible approach. Recognizing that the technology simply did not exist to accomplish the goal of completely cigarette-resistant furniture, UFAC structured its program on the premises of: (1) extensive research and testing, (2) participation by all segments of the industry, (3) UFAC-approved furniture construction criteria, revised and updated as necessary, to reflect improved technology, (These criteria emphasize cost-effective production techniques and retention of fabric and design choice), and, (4) consumer education and information.

Millions of dollars and countless hours of volunteer and professional time from within the furniture industry have contributed to UFAC success in all four areas. We estimate that over 88 percent of the upholstered furniture produced in the U.S. today, is committed to the UFAC program. UFAC criteria have dramatically altered the construction of upholstered furniture, with even more improvements scheduled to take effect in coming months. We have reached a countless number of consumers with the UFAC safety message, including lower income, elderly, school children, and Spanish-speaking populations.

On October 21, 1981, UFAC saw much of its hard work pay off. It was on that date that the Consumer Product Safety Commission unanimously agreed to defer further regulatory action, and instead, involved the agency in a co-operative working relationship with us. This agreement was based on a continued commitment by the furniture industry to the voluntary program and on improving technology in the area of furniture smolder-resistance to cigarettes. Pursuant to the decision, UFAC's Technical Committee meetings were opened to the CPSC, allowing a vital information exchange in the areas of research and testing. UFAC representatives as well as the CPSC staff periodically report to the Commissioners on the progress of the program.

1983 may prove to be one of the most active years for the UFAC program since its inception. We are currently producing an audio-visual presentation to be used in enhancing our manufacturer and retailer commitments to the program, and to supplement our on-going consumer education activities. Our recent technological breakthroughs—the heat-conducting welt cord and the use of smolder-resistant interior fabrics—are expected to be incorporated in furniture produced and shipped from manufacturers after July 1, 1983. Also, we will continue to evaluate new products designed to improve the smolder-resistant qualities of upholstered furniture. We look forward to the CPSC's continued assistance in, and support for, these activities.

Regarding the overall issue of re-authorization for the CPSC, UFAC has very few specific suggestions, since the 1981 legislation encompassed many reforms the industry supported. The 1981-approved CPSC Charter has, in our opinion, resulted in improved procedures employed at the agency and a more balanced approach to consumer safety issues.

UFAC would urge the Congress not to take any action which could result in a weakening of the 1981 reforms to the Consumer Product Safety Act and transferred Acts. These reforms were thoroughly studied and gained widespread support during the 96th Congress' consideration of reauthorization of the Consumer Product Safety Commission.

Again, I appreciate the opportunity to appear before you today. The future direction of the Consumer Product Safety Commission is of critical interest to the furniture industry and more specifically to the Upholstered Furniture Action Council. Our program thrives, not on adversarial pressure and unreasonable demands, but on co-operation and assistance such as we have received in recent years from the agency. Attached to my statement, to be included in the record, is a copy of UFAC's

most recent publication, "An Ounce of Prevention", outlining more specifically the history of UFAC and recent activities in the flammability area.

I will gladly answer any questions the Committee may have regarding the Upholstered Furniture Action Council.

Senator KASTEN. Mr. Carey, thank you. The committee appreciates the efforts that you personally have undertaken and also of the Upholstered Furniture Action Council, and I think it is an example of the direction a number of people are seeking to go in.

Mr. Thomas Smith, representing the National Kerosene Heaters Association. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I am pleased to have the opportunity to address this committee on the legislation reauthorizing the Consumer Product Safety Commission, specifically in the context of its investigations of portable kerosene heaters and indoor air quality.

The products marketed by our members today are subject to what has been termed one of the Commission's top priority investigations. That the Commission has undertaken such an investigation has harmed our business severely, resulting in the loss of hundreds of thousands of dollars of sales, a drop in consumer confidence in our product and an expenditure that could approach \$500,000 by the industry to prove our products are safe.

Many consumers who otherwise would have used our heaters to stay warm and reduce their home heating costs this winter have not purchased them because of the publicity surrounding the Commission's investigation, which to date has yielded no definitive results. Some 1.5 million heaters remain unsold this heating season. Perhaps no other industry in America has suffered the ill effects of investigation by the Commission with less objective evidence of hazards to consumers.

You may be surprised to learn, then, that our association supports reauthorization of the Consumer Product Safety Commission. Moreover, we join with those urging Congress to appropriate adequate funds to carry out the charter it has been given. Additionally, we urge Congress to oversee the Commission's activities more closely to see that the regulatory priorities fit the resources at hand.

We believe regulation of portable kerosene heaters because of emissions constitutes the setting of an indoor air quality standard, a task that exceeds the CPSC's budgetary resources and statutory authority. Nevertheless, because the investigation is under way and a cloud has been placed over our industry, we have a need for the CPSC to address this issue with an evaluation that is not only thorough but also comprehensive and definitive.

The introduction of our product into the United States has met with overwhelming success. Sales in this country have increased from a small number in 1973 to over 4.5 million units this season, an increase in the total number of units in use of over 4,500 percent. High and ever increasing home heating costs have accounted for this phenomenal growth in these kerosene heater sales.

By lowering their thermostats 10° or more, heating just the rooms they are using, families with portable kerosene heaters are fighting back against soaring energy prices. Nine to ten million consumers utilizing our product this winter could realize a savings



approaching \$5 billion annually on their home heating costs and save the equivalent of 40 million barrels of oil.

The Consumer Product Safety Commission's 1981 data, collected in conjunction with the U.S. Fire Administration, indicated that despite a 45-fold increase in the number of units in use, there were many times more fires and injuries from wood burning, coal, gas, and electrical appliances. This data is the basis for the industry's claim that the modern kerosene heater is indeed the safest alternate heating appliance on the market today. I would like to add that, to our knowledge, not one fatality has been confirmed as attributed to emissions from modern portable kerosene heaters when used properly by consumers, nor have there been any liability claims of significance due to heater emissions.

On October of 1982, Consumer Reports magazine published an article repeating fire safety concerns, and its own conclusions using theoretical assumptions to calculate peak emission concentration levels that a pollution hazard existed. This conclusion was aired on all the major networks and literally thousands of newspapers and magazine articles. By the time of the CPSC's January 27 briefing, the industry had initiated a testing program costing \$300,000 to \$500,000 divided into three parts aimed at gathering empirical data in hour-by-hour measurements to replace the assumptions in dispute.

The first part consisted of an extensive consumer use survey to determine the use pattern of kerosene heaters in homes. The second part involved chamber tests similar to those previously conducted by others. The third part involved a complex computer model that would permit an analysis of all possible combinations of the 10 to 12 variables in dispute, including established air exchanges among rooms, based upon in-home testing to validate the model.

The preliminary results shared at the January meeting utilized the model developed for DOE by the Lawrence Berkeley Laboratories and demonstrated conclusively that the concentration levels were 16 to 40 times lower than those originally alleged. The Commission staff perceived the merit of our study, factored it into their calculations, but apparently discounted the \$1 million EPA-DOE study by which we established air exchanges and concluded that in closed rooms the emission levels were still of concern.

The compelling quality of our research led the staff to caution the Commissioners, quite properly, that their conclusions could be dead wrong. The newspaper coverage reported however only the Commission's warnings.

To sum up our experience with the CPSC investigation to date, we were indicted as an environmental hazard by a few magazine articles, tried in the press, and by certain consumer groups, and uninformed State officials. Our guilt has been presumed and the verdict rendered in economic damage and denial of every conceivable notion of fair play, not to mention due process of law. Our experience raises several issues about the functioning of the Commission.

The Commission singled out portable kerosene heaters from among the many source of indoor air pollution, despite the fact that the National Research Council in its 1981 report on indoor

pollutants mentioned kerosene heaters as only one of many supplemental heating devices, including wood, coal, and gas heaters. That report also singled out natural gas stoves as a major source of indoor pollution, but urged more research on all sources before conclusions could be drawn.

A single burner on a gas stove, for example, could emit three times the emission levels of portable kerosene heaters, and the total peak emission concentrations from the stove exceed four times the worst-case calculations for kerosene heaters. None of these products are included in the CPSC investigation.

As we stated, no history exists of significant health problems from portable kerosene heater emissions. Moreover, the field of indoor air pollution is virtually virgin territory and no indoor standards exist against which emissions can be measured to determine potential health effects.

In our first appearance before the Commission, we pledged cooperation in developing a standard for indoor air quality. To judge a product's environmental impact in the house is to presume an evaluation with reference to such a standard, official or unofficial.

EPA outdoor standards incorporate a significant margin of safety as a social goal. Their applicability indoors as a minimum health standard to prevent unreasonable risk of injury under the CPSC charter should be carefully evaluated. Even today, we do not know by which standard we are to be judged. Clearly justice demands that such a development take place under adequate procedural safeguards before any consumer product is judged in terms of its compliance.

The Commission lacks the resources to resolve this issue promptly. Obviously we would have preferred that the Commission never began this investigation. Now that it has, however, we are told informally that budgetary considerations are hampering the Commission's ability to resolve the matter rapidly.

The complexity of the issues involved, the lack of empirical research in the field, and the lack of Federal indoor air quality standards based upon epidemiological data exacerbate the problem. We are well aware of the ongoing debate over CPSC funding. We have no way of knowing whether the \$32 million requested by the administration for fiscal year 1984 is adequate or not to provide the Commission the resources necessary to reach a rapid resolution. Certainly that is a matter for Congress and this committee to look into.

Our understanding is that CPSC staffing and equipment are totally inadequate to the task of developing an indoor air quality standard. They have no combustion engineers involved in the process, very few epidemiologists, and no one with extensive background in the characteristics of the very air pollutants they are investigating. Their action will be based on primary literature developed in the promulgation of different standards with different social goals.

We would support additional funding for the Consumer Product Safety Commission so it can develop a meaningful indoor air quality standard and avoid regulating ours or any other product on an ad hoc basis.

We also support a joint effort with the EPA to develop a standard. Naturally we believe that if such a standard is developed with reference to all products affected, our good name will be cleared. We also believe that such development is essential to providing procedural due process to the firms involved. It is also essential to protect the health and safety of consumers and not unnecessarily deny them significant economic benefits.

Thank you, Mr. Chairman for the opportunity to present our views, and I would be happy to answer any questions.

[The statement follows:]

STATEMENT OF J. THOMAS SMITH, MANAGING DIRECTOR AND GENERAL COUNSEL,  
NATIONAL KEROSENE HEATER ASSOCIATION

Mr. Chairman and members of the committee, my name is J. Thomas Smith and I am managing director and general counsel for the National Kerosene Heater Association. The National Kerosene Heater Association is a not-for-profit trade association headquartered in Nashville, Tennessee, representing a majority of the marketers as well as distributors and dealers of portable kerosene heaters.

We are pleased to have the opportunity to address the committee on the legislation reauthorizing the Consumer Product Safety Commission, specifically in the context of its investigations of portable kerosene heaters and indoor air quality.

The products marketed by our members today are subject to what has been termed the Commission's top priority investigation. That the Commission has undertaken such an investigation has harmed our business severely, resulting in the loss of hundreds of thousands of dollars of sales, a drop in consumer confidence in our product and an expenditure of approximately half a million dollars by the industry to prove our products are safe. Many consumers who otherwise would have used our heaters to stay warm and reduce their home heating costs this winter have not purchased them because of the publicity surrounding the Commission's investigation, which to date has yielded no definitive results. Some 1.5 million heaters remain unsold this heating season. Perhaps no other industry in America has suffered the ill effects of continuous investigation by the Commission with less objective evidence of hazards to consumers.

You may be surprised to learn, then, that our association supports reauthorization of the Consumer Product Safety Commission. Moreover, we join those who are urging Congress to appropriate adequate funds to carry out the charter it has been given. Additionally, we urge Congress to oversee Commission activities more closely to see that regulatory priorities fit the resources at hand.

We believe regulation of portable kerosene heaters because of emissions constitutes the setting of an indoor air quality standard, a task that exceeds the CPSC's budgetary resources and statutory authority. Nevertheless, because the investigation is underway and a cloud has been placed over our industry, we have a need for the CPSC to address this issue with an evaluation that is not only thorough, but also comprehensive and definitive.

PORTABLE KEROSENE HEATERS AND THE CPSC

To understand fully why our industry would take such a position, it is important to look at the history of our dealings with the Commission. The modern generation kerosene heater is a relatively new product in the American marketplace that was introduced a scant seven years ago. Kerosene heaters have been used extensively, however, in many other countries of the world, and in Japan for over forty years, as a sole source of heat for over ninety percent (90 percent) of the households. In that country, the product has had an admirable safety record, and the safety innovations and design and performance that distinguish our product from its earlier unsafe predecessors have been the subject of a national award from the Emperor of Japan.

The introduction of the product into the United States has met with overwhelming success. Sales in this country have increased from a very small number in 1973 to over 4.5 million units this season—an increase in the total number of units in use of over 4,500 percent. High and ever-increasing home heating costs have accounted for this phenomenal growth in kerosene heater sales. Natural gas, fuel oil and electric rates have all doubled in the past five years. By lowering their thermostats ten degrees (10°) or more heating just the rooms they are using, families with portable kerosene heaters are fighting back against soaring energy prices. Even one of our



major detractors—Consumer Reports magazine—confirms that a consumer cutting down his central thermostat under certain other conditions could save up to \$500 per heating season. That means that the nine to ten million consumers utilizing our product this winter season could have realized a savings approaching five billion dollars annually on their home heating costs. Energy savings annually approach the equivalent of 40 million barrels of oil.

That success story and enormous consumer benefits have led at least seven state legislatures which examined the issue to reverse statutory bans on the sale of old style units to permit the sale of modern heaters. They did so by adopting a "model" statute recommended by our industry that required all units to be safety-tested and certified prior to sale.

In 1973 and again in 1980, the Consumer Product Safety Commission received a petition from fire service officials to ban portable kerosene heaters as a hazardous appliance. In both instances, the Commission conducted a prompt investigation and determined that the injury data could not justify a ban on the product in view of the voluntary standard in effect in the industry.

#### EMISSIONS CONCERNS

In March 1982, during the course of the legislative efforts in the State of California, we learned that the Lawrence Berkeley Laboratories published results of certain chamber tests conducted on modern portable kerosene heaters and determined that source levels in the chambers were sufficient to raise an environment concern. In response to this testing, the industry formed a joint industry/government task force in California to examine the issue and began extensive research to determine the environmental impact of the use of the heaters in an actual home environment. Later in the year, the Consumer Product Safety Commission decided to include kerosene heaters as a priority project for the ensuing year.

In October of 1982, Consumer Reports magazine published an article in essence repeating fire safety concerns, republished the findings of the Lawrence Berkeley Laboratories, and its own conclusion using theoretical assumptions of calculate peak concentration levels that a "pollution hazard" existed. This conclusion was aired on all the major networks and in literally thousands of magazine and newspaper articles across the country.

Shortly thereafter, the Consumer Product Safety Commission published its 1981 data collected in conjunction with the U.S. Fire Administration. The data, which is attached to these remarks, indicated that despite a 45 fold increase in use, there were many times more fires and injuries from wood burning, coal, gas and electric appliances. This data is the basis for the industry's claim repeated in several fora that the modern portable kerosene heater is indeed the safest alternative heating appliance on the market today. There has been no fires associated with proper use of the product.

I would like to add that, to our knowledge, not one fatality has been confirmed as attributed to emissions from modern portable kerosene heaters when used properly by consumers. Nor have there been any liability claims of significance due to heater emissions. There is absolutely no official history of modern portable kerosene heater emissions harming the health of any of the millions of people who use them today.

Following the publication of the Consumer Reports article, the Consumer Product Safety Commission called for an "informal briefing" on the matter on October 27, 1982, and invited the industry, Consumers Union and others to share their views.

The industry and the National Kerosene Heater Association were invited to the October briefing because of the extensive work that had begun in early summer in cooperation with the Commission's staff. To preserve our excellent safety record, we were at work on a massive preventive safety and consumer education program in cooperation with the CPSC and the fire service that would:

Require detailed labeling of all heaters with safety and fire precautions; establish quality standards and monitoring compliance for kerosene; enact stringent regulatory standards governing kerosene heater use; update product design and performance on a continuing basis; and initiate a massive consumer education program involving the fire service and the CPSC, as well as distributors and dealers of kerosene and kerosene heaters.

#### EMISSIONS EXPERTS DISPUTE CONSUMERS UNION STUDY

We delivered a progress report at that time with preliminary findings from our work begun in June by one of the foremost authorities in monitoring and modeling indoor air quality, Dr. Fredrick Shair of the California Institute of Technology. His preliminary modeling indicated that modern kerosene heaters do not constitute a

"serious pollution hazard." Dr. Shair's study cited a \$1,000,000, two-year study conducted for the Department of Energy and Environmental Protection Agency documenting up to four (4) air exchanges per hour room-to-room inside the house that would substantially reduce the emission concentration levels alleged by Consumer Reports that had used a factor of one-half ( $\frac{1}{2}$ ) indoor air exchange in rendering their conclusions. The results of Dr. Shair's study were subsequently made available to the public, the press and the staff of the Commission. Consumer Reports magazine also made a presentation standing by its original conclusions.

The CPSC's staff presented its own calculations. They cautioned the Commissioners that their calculations were preliminary only and no indication of the actual level that would be found in homes. The press, nevertheless, reported as did Consumer Reports magazine, that the Consumer Product Safety Commission "findings" closely paralleled each other.

By the time of the next "briefing" scheduled by the Commission on January 27th, the industry had initiated a testing program costing \$300,000 to \$500,000 divided into three (3) parts aimed at gathering empirical data in hour-by-hour measurements to replace the assumptions in dispute. The first part consisted of an extensive consumer use survey to determine the use patterns of kerosene heaters in homes. The second part involved chamber tests similar to those previously conducted by others. The third part involved a complex computer model that would permit an analysis of all possible combinations of the ten to twelve variables in dispute based upon sound empirical evidence developed in in-homes tests. The preliminary results shared at the January meeting utilizing a model developed for DOE by the Lawrence Berkeley Laboratories demonstrated conclusively that the concentration levels were 16 to 40 times lower than those originally alleged.

The Commission's staff perceived the merit of Dr. Shair's study, factored it in their calculations, but apparently discounted the \$1,000,000 DOE/EPA study and concluded that in closed rooms the emission levels were still of concern. The compelling quality of our research led the staff to caution Commissioners that their conclusions "could be dead wrong."

#### DAMAGE TO THE INDUSTRY

Despite major efforts on the part of the industry to disseminate our research by the foremost names in the indoor air quality field, the message received by consumers nationwide was that there was a pollution hazard associated with our appliance. The fire service nationwide on the basis of the adverse publicity began ordering products off the shelves citing the older laws banning a product bearing no resemblance to ours. Consumer groups, state and local health agencies, and citizen groups issued their own warning statements based on the publicity. As a result, sales were brought to an abrupt halt, companies with considerable inventory to meet anticipated consumer demands faced severe financial pressures. Reductions in work force occurred and the industry was cast into a major economic crisis.

Our comprehensive testing program will be finished in thirty (30) days, and we will, of course, share the results with the Commission. The Commission's own program, however, and its own decision on the matter will not be completed until June. Decisions being made about production for next winter cannot be made until the CPSC has rendered its decision, which will result in additional economic troubles for the industry, loss of jobs and denial of significant savings on the part of the consumers on their heating bills next winter.

To sum up our experience with the CPSC investigation to date, we were indicted as an environmental hazard by a few magazine articles, tried by the press, certain consumer groups and uniformed state regulatory officials. Our guilt has been presumed and the verdict rendered in economic damage and denial of every conceivable notion of fair play not to mention due process of law. The CPSC investigation continues.

#### ISSUES FOR CONGRESS TO ADDRESS

Our experience raises several issues central to the functioning of the Commission. These are relevant to any industry subjected to CPSC investigation and merit the attention of Congress not only because of the damage done our industry, but also the potential for damage to others and to the public interest.

*1. Unfair Regulatory Priorities.*—The Commission singled out portable kerosene heaters for investigation on emissions from among the many sources of indoor air pollution despite the fact that the National Research Council, in its 1981 report on indoor pollutants, mentioned kerosene heaters as only one of many supplemental heating devices, including wood, coal and gas heaters. That report also singled out natural gas stoves as a major source, but urged more research on all sources before conclusions could be drawn.

It is well known that wood stoves emit the known carcinogen benzo[a]pyrene and studies are just beginning into the re-infiltration of wood stove emissions into the home. It is a known fact that a single burner on a gas stove emits three (3) times the emission levels of a portable kerosene heater and that the peak emission concentrations can exceed four (4) times the allegedly worst case calculations for kerosene heaters. Neither of these products are a part of the Commission's study. Nor does the Commission's study give any consideration to the environmental or pollution impact of wood stoves into the outside air. Because of the growing pollution problems they cause, especially in valleys and other areas where the wood smoke can accumulate, some states have considered banning them. Clearly an indoor air quality standard cannot be promulgated with a total disregard of and without reference to the total environmental impact. This will apparently be happening, however, because of the divergent jurisdictions of the EPA and the CPSC, and the budget limitations of the CPSC.

*2. Lack of Evidence.*—As we stated, no history exists of significant health problems from portable kerosene heater emissions. Moreover, the field of indoor air pollution is virtually virgin territory, and no standards exist against which emissions can be measured to determine potential health effects.

One must remember that four factors determine the effect of emissions upon an individual's health. These include the amount or level produced at the source, the concentration created in a room as the source emission mixes with the air, the concentration to which an individual is subjected over a period of time, and the relative effects these levels may have on a particular individual.

The existing EPA air quality standards address only outdoor levels. These were promulgated with very specific social goals and pollutant sources in mind. The standards incorporate a significant margin of safety as a social goal, and may not be an accurate measure of minimum health standards indoors. They were based, however, upon epidemiological studies conducted in pursuit of those goals, as well as actual air samples taking into account all applicable pollution sources. Similarly, the OSHA standards were promulgated specifically for the work place environment taking into account all potential pollution sources in that environment.

In our October appearance before the Commission, we pledged our cooperation in developing a standard for indoor air quality. To judge a product's environmental impact in a house is to presume an evaluation with reference to such a standard—official or unofficial. Even to date we do not know by which standard we are to be judged. Clearly, justice demands that such a development take place before any consumer product is judged in terms of its compliance.

We are confident our products are safe, and we are conducting groundbreaking research in this area. But there clearly is no evidence to date to cause concern among consumers nor the warnings issued by the Commission. And it is unlikely that the results of the Commission's current investigation will be very enlightening because no health-based indoor standards exist and because the Commission is looking at kerosene heater emissions apart from all other sources of indoor air pollution.

Contrast the approach the Commission is taking with the careful procedures Congress enacted as necessary prerequisites in the Clean Air Act. In that legislation the mandated ambient air quality standards for all pollutants was developed first, with hearings enacted at each stage, and then the individual products are regulated on a priority basis with reference to that standard. Indeed, even if the CPSC concludes its study in June, our industry may very well face a second round of regulation under a different set of rules developed by EPA.

*3. The Commission lacks the resources to resolve this issue promptly.*—Obviously, we would have preferred to the Commission never began this investigation. Now that it has, however, we are told informally that budgetary constraints are hampering the Commission's ability to resolve the matter rapidly. The complexity of the issues involved, the lack of empirical research in the field and the lack of a federal indoor air quality standard based upon epidemiological data exacerbate the problem.

We are well aware of the ongoing debate over CPSC funding. We have no way of knowing whether the \$32 million requested by the administration for fiscal year 1984 is adequate or not to provide the Commission the resources necessary to reach a rapid resolution. Certainly that is a matter for Congress and this committee to look into.

Our understanding is that their staffing and equipment are totally inadequate to the task of developing an indoor air quality standard. They have no combustion engineers involved in the process, very few epidemiologists and no one with extensive background the characteristics of the very air pollutants they are investigating. Their action will be based on primary literature developed in the promulgation of different standards with different social goals.



We would support additional funding for the Consumer Product Safety Commission so it can develop a meaningful indoor air quality standard, and avoid regulating ours or any other product on an ad-hoc basis. We would also support a joint effort with the EPA to develop the standard. Naturally, we believe that if such a standard is developed with reference to all products affected, our good name will be cleared. We also believe that such a development is essential to providing procedural due process to the firms involved. It is also essential to protect the health and safety of consumers and not unnecessarily deny them significant economic benefits.

Thank you Mr. Chairman and members of the committee for the opportunity to present our views. I would be happy to answer any questions you may have.

### CPSC NATIONAL PROJECTION OF LOSSES FROM RESIDENTIAL FIRES INVOLVING HEATING EQUIPMENT—1981

[Dollar amounts in millions]

|                                       | Fires                | Deaths | Injuries | Property loss |
|---------------------------------------|----------------------|--------|----------|---------------|
| All residential fires.....            | 733,000              | 5,600  | 52,400   | \$3,259       |
| All Heating equipment fires.....      | <sup>1</sup> 214,100 | 870    | 8,460    | 634.6         |
| Solid fuel heating appliances.....    | 130,100              | 290    | 2,760    | 264.8         |
| Fixed heater.....                     | 39,300               | 90     | 690      | 61.1          |
| Portable heater.....                  | 1,900                |        | 60       | 4.4           |
| Fireplace.....                        | 30,200               | 80     | 900      | 85.4          |
| Central furnace.....                  | 2,800                | 10     | 70       | 9.6           |
| Chimney, flue.....                    | 44,700               | 70     | 640      | 69.6          |
| Chimney connector.....                | 7,900                | 40     | 260      | 28.4          |
| Other or unknown.....                 | 3,400                | 10     | 140      | 6.3           |
| Gas fired heating appliances.....     | 23,100               | 130    | 2,470    | 135.7         |
| Fixed heater.....                     | 4,900                | 50     | 370      | 29.2          |
| Water heater.....                     | 10,000               | 20     | 1,300    | 59.8          |
| Central furnace.....                  | 5,600                | 50     | 560      | 33.2          |
| Other or unknown.....                 | 2,600                | 10     | 240      | 13.6          |
| Electric heating appliances.....      | 14,700               | 170    | 1,040    | 71.2          |
| Fixed heater.....                     | 4,300                | 30     | 270      | 24.9          |
| Portable heater.....                  | 3,200                | 140    | 590      | 26.2          |
| Water heater.....                     | 1,100                | 10     | 40       | 6.8           |
| Central furnace.....                  | 5,200                |        | 110      | 9.1           |
| Other or unknown.....                 | 900                  |        | 30       | 4.2           |
| Liquid fueled heating appliances..... | 8,800                | 120    | 780      | 36.0          |
| Fixed heater.....                     | 1,700                | 20     | 110      | 6.1           |
| Portable heater <sup>2</sup> .....    | 900                  | 30     | 210      | 6.3           |
| Water heater.....                     | 800                  | 10     | 90       | 6.2           |
| Central furnace.....                  | 4,100                | 50     | 310      | 13.2          |
| Chimney flue connector.....           | 900                  | 10     | 50       | 2.7           |
| Other or unknown.....                 | 400                  | 10     | 10       | 1.4           |
| All other unknown fueled heaters..... | 37,400               | 160    | 1,400    | 126.8         |
| Fixed heater.....                     | 4,800                | 70     | 250      | 24.2          |
| Portable heater.....                  | 1,400                | 20     | 120      | 13.5          |
| Fireplace.....                        | 8,000                | 20     | 290      | 36.0          |
| Water heater.....                     | 1,200                |        | 120      | 6.7           |
| Central furnace.....                  | 3,100                | 20     | 360      | 15.9          |
| Chimney flue.....                     | 12,700               | 10     | 150      | 13.0          |
| Chimney connector.....                | 2,100                |        | 10       | 5.1           |
| Other or unknown.....                 | 4,200                | 20     | 100      | 12.3          |

<sup>1</sup> Projections were derived by applying the proportions observed in data from the 33 states reporting to the U.S. Fire Administration in 1981 to national aggregate estimates of fire losses prepared by the National Fire Protection Association and the U.S. Fire Administration.

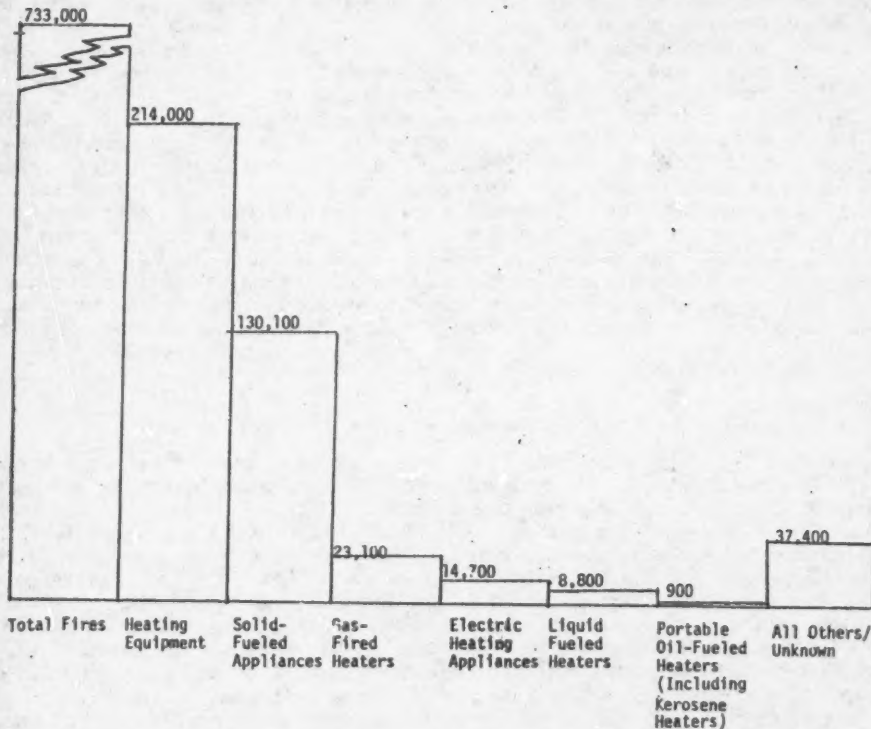
<sup>2</sup> Because of rounding, column detail may not always add to the total.

<sup>3</sup> Includes portable kerosene heaters.

Source: National Fire Protection Association; U.S. Fire Administration; U.S. Consumer Product Safety Commission/EPHA.

## RESIDENTIAL FIRE PROJECTIONS FOR 1981

SOURCE: Consumer Product Safety Commission



[The following information was subsequently received for the record:]

## QUESTIONS OF THE MAJORITY AND THE ANSWERS THERETO

**Question 1.** Why do you believe that the Commission has singled out kerosene heaters for its investigation of indoor air pollution?

**Answer.** The CPSC's decision to start its air quality program with kerosene heaters was undoubtedly abetted by the October 1981, issue of Consumer Reports magazine that republished some test chamber work conducted by the Lawrence Berkeley Laboratories ("LBL"), as well as fire safety concerns often voiced by the fire service. The CPSC's decision to reevaluate the overall safety of kerosene heaters was published, however, in the summer of 1982. LBL's findings were public then, but whether the Commission knew about them or the proposed contents of the October Consumer Reports article, I do not know. The article and ensuing publicity presented an opportunity and perhaps a perceived need for the Commission to utilize its safety expertise to settle the issue for the magazine, the fire service, the industry, and consumers. The article itself urged the Commission to reexamine kerosene safety. Segments of the fire service had recently lost state legislative "use" restrictions in seven states because of the popularity of the product. The ineffectiveness of the old laws, and the safety design and testing requirements in the industry bills. They were undoubtedly a lobbying force in the Commission's decision. Although other products such as wood or coal stoves were more of a pollution and fire hazard, they were not as publicly controversial.

**Question 2.** Are manufacturers likely to be damaged by unfavorable releases of information made under the Freedom of Information Act? Please provide examples, if you know of any, of instances in which the CPSC's release of information has harmed the kerosene heater industry.

Answer. Possibly, but the damage can be limited if the procedures outlined in Section 6(b) of the Consumer Product Act are followed. Enclosed are copies of the press clippings reporting on "briefings" held at the Commission.

Although the staff and the Commissioners were careful with their remarks, reports of their "preliminary findings" were especially damaging. Headlines conveying such conclusions as "Kerosene Heater Pollution Hazard Cited," ran in newspapers across the country. Television coverage of the January briefing heard Commission remarks that no consumer education existed. These remarks were made just prior to the announcement of extensive industry consumer education campaigns that took place after the camera crew left. It should be noted that even "balanced" coverage of the allegation and the rebuttal places a question mark in consumer minds that can adversely and directly impact sales. We know of no incidents where release of information under the Freedom of Information Act has harmed our industry.

#### QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

**Question 1.** Trial by press release in the case of kerosene heaters was not originated by CPSC press releases, but by publication of a Consumer Reports study. Would stringent 6(b) regulations help in this situation?

Answer. Although not originated by CPSC's press releases, the adverse publicity surrounding the CPSC's investigation has been very damaging to the industry. "Warnings" to consumers are certainly proper where there is objective evidence of actual harm, serious injury, or death. Where, however, the investigation involves a scientific debate about *possible chronic* long term health effects based upon theoretical assumptions and mathematical calculations, different procedures should apply. The public interest demands that such debates of subjects beyond the knowledge of the average consumer be settled prior to widespread publication of "findings." Failure to do so will damage the credibility of the government agency, and cause unnecessary and unwarranted public fears and distrust. Failure to do so in the kerosene heater industry not only costs consumers money but probably causes some to turn to alternatives that are less safe or add to the toll of hypothermia deaths (300 last year) or adverse health effects (2-3 million last year) stemming from a lack of enough affordable heat in their homes.

Section 6(b) regulations as currently drafted would not have helped. If CPSC continues to regulate in the chronic hazard area, the agency or Congress should impose disclosure restrictions to help assure scientific decorum, integrity, and credibility.

**Question 2.** Do you believe there is a more appropriate agency to investigate kerosene heaters?

Answer. There is not a more appropriate agency to evaluate product design, performance, and fire safety of kerosene heaters. From the standpoint of air quality evaluation, the jurisdiction is diverse and far from clear.

The Environmental Protection Agency is staffed with the expertise and has the funds to develop an indoor air quality standard with reference to all sources of pollution inside the home. Its enabling statute is certainly more appropriate and may give more authority in regulating life quality issues such as chronic hazards than the CPSC. The Charter of the Commission is to regulate "unreasonable" risks of injury that has been interpreted to mean risks of death, serious injury, or frequent illness. Congressional history of the Consumer Product Safety Act contains no evidence of an interest to vest CPSC with jurisdiction over "chronic" hazards relating to health. Ironically, because of CPSC's assertion of jurisdiction in the air quality field, EPA's jurisdiction may be ousted by virtue of Section 9(a) of the Toxic Substances Control Act. Apart from the legal issue, EPA's leadership has expressed no interest in indoor air quality.

The Commission has expertise in product design and performance standards that could prove useful in requiring compliance with an air quality standard. The Administrative Procedure Act quite properly will require that such a standard be established through rulemaking procedures before any product can be subject to a mandatory safety rule under the Consumer Product Safety Act. Beginning such procedures without extensive research into all pollutant sources in the home and severity of risks associated with each, and a policy decision concerning ambient air levels indoors, will have CPSC's regulatory approach subject to procedural due process at-



tacks at every turn. The product-by-product approach without such a priority assessment could require banning a product because levels from a prior target were set too low, or a procedural escape for serious pollutants because of the inconsistency.

**Question 3.** In your statement, you say you "would support additional funding for the CPSC..." Would you propose earmarking that extra money for technical staff, scientific research and product testing?

**Answer.** The extra money is needed for air quality research if the Commission can rectify the procedural issues discussed previously. Congressional earmarking should not, however, be necessary since I am confident that the Chairman and Commissioners are cognizant of the need.

**Senator KASTEN.** Thank you, Mr. Smith.

**Dr. David Pittle,** representing the Consumers Union. David.

**Dr. PITTLE.** It is a pleasure for me to have the opportunity, Mr. Chairman, to present my views to you today.

During the last 9 years I have come before your subcommittee as a member of the Commission and raised issues that I felt as an insider were worthy of your consideration. Today I appear as an individual and as a consumer and as the technical director of Consumers Union, which is one of the largest consumer testing organizations in the world, and as a slightly used CPSC Commissioner.

During the last 5 months I have reflected long and hard on my many experiences within CPSC. After much sifting and winnowing, I am left with a clear and a firm recollection of CPSC's purpose and its performance in fulfilling that purpose.

Since the beginning, CPSC was a tiny agency with a huge mandate. The jurisdiction involved 15,000 different products associated with 30,000 deaths and 33 million injuries each year. Congress intended for us to make those numbers smaller in terms of deaths and injuries.

During early congressional oversight hearings I vividly remember being given very strong direction to be vigorous in protecting consumers through public warning notices, product standards, product bans, and product recalls wherever such actions were deemed reasonable. We were criticized sharply at times for not writing enough standards and not recalling dangerous products fast enough. We did our best to be responsive.

At the last reauthorization, CPSC was criticized for writing too many standards, for giving out too much public information, for being too quick to seek product recall. Yet the basic mandate had not changed and the CPSC had not changed at least in its commitment to implement the substance of the statute vigorously. So what happened to Congress dream?

What had changed was the Congress. There was a mood that Government was out of touch with the people, that the Federal bureaucracy was comprised of self-appointed do-gooders who simply did not appreciate what it took to meet a payroll every week—in short, a runaway government.

Mr. Chairman, CPSC has never been a runaway agency. In fact, quite the opposite is true. The Commission has always been mindful of its legislative origin and has done its best to follow the congressional mandate to the letter and spirit of the statute. Nevertheless, Congress took several steps in 1981 to restrict the agency's activities. Upon reflection, I think the Congress went too far for it ultimately reduced CPSC's ability to provide the protection consumers need. I would like to share with you three major concerns.

The 1981 amendments, as you know, added a considerable burden to the already restrictive provisions dealing with information disclosure. I believe public access to information about dangerous products or even products suspected of being dangerous are fundamental to a workable competitive marketplace. Yet those amendments have brought most of the information disclosure to a halt.

You have heard much about 6(b) today. I would only add my personal observation, which results from 7 years of experience prior to the Supreme Court's decision in *GTE Sylvania*. The fact is that with respect to the disclosure of information requested under the Freedom of Information Act, CPSC's approach works smoothly, efficiently, and fairly. Not once in those 7 years did I hear of a company being harmed as a result of information released under FOIA. The concern raised by industry citing the possibility of serious injury to a company from such disclosure is misplaced and does comport with the facts.

CPSC is the only health and safety agency in Washington that does not routinely give out consumer complaints under the Freedom of Information Act. FDA does, EPA does, NHTSA does, OSHA does, but the CPSC does not. That makes no sense. I urge the committee to return the CPSC to where it was prior to the *GTE Sylvania* decision; namely, to adopt a distinction between affirmative disclosure to the public by CPSC and releasing data upon a request under the Freedom of Information Act.

Second, in my opinion, the general reaction that developed within the Commission among the Commissioners and its staff after the 1981 amendments, especially those in section 9 of the CPSA, was that rulemaking had become a monumental burden to the agency. I predict that the initiation of rulemaking in the future will be extremely rare. It is unclear whether the stringent requirements added to section 9 were simply an overreaction by Congress or an indirect message that rulemaking was to be discouraged.

This is indeed regrettable in either case. Often the Commission finds itself in a situation where requests by CPSC for voluntary action do not produce results. Without a willingness on the part of industry to solve its own problems, the Commission then has to decide whether the many hurdles of its rulemaking procedures will produce results worth the tremendous expense of staff time and money.

In particular, where the hazard is well understood and the fix is both inexpensive and available, it makes no sense for the agency to be required to go through such lengthy and costly procedures as now exist. I cite the Commission's recent experience with the toy chests as a case in point.

If you desire an effective agency, one that produces results that are permanent and to the benefit of consumers in terms of reduced death and injury, at a minimum Congress should make clear to the Commission and to the world that the Commission has a legitimate role to play when progress is not forthcoming from a voluntary effort.

A strong message is needed from you that mandatory standards are appropriate when an industry is recalcitrant and consumers

continue to be injured or killed. Such a message should be accompanied by improving the flexibility of CPSC's regulatory apparatus.

Third, as to resources, Congress has gone too far in slashing the Commission's budget. OMB has gone too far in cutting the agency's staffing level. It is simple as that. As a result, fewer deaths and injuries are being investigated, fewer hazard-related projects are under way, fewer investigations are being conducted to determine compliance, fewer recalls are being monitored, less information is being provided to the public. In short, less protection is being provided for the consumer.

Furthermore, I cannot emphasize enough that when the Commission staff is being decreased in size it is far more important to preserve as much of the technical staff as possible. This is not the time to increase CPSC's public relations staff, the outreach staff, or the I&E staff, as is currently being considered. The CPSC staff work is highly technical and they have lost an inordinate number of engineers, health scientists, economists, and statisticians.

Just to put this in more local language, can you imagine what would have happened if Joe Gibbs at the beginning of the season had traded in John Riggins for two cheerleaders and a new set of uniforms?

I have not taken a poll, but I am willing to bet that most members of the industry would prefer a stronger, competent technical staff at CPSC rather than increasing the outreach staff. As an affected industry, they are vitally concerned and affected by the Commission's decisions, and they want to make sure the agency knows what they are talking about. I would hope this committee would give guidance to the Commission on just that point.

Finally, Mr. Chairman, we must not lose sight of what the consumer wants. As pointed out in the Harris poll, we learned first that 48 percent of the public believed that not enough Government regulation is addressed to products that are dangerous, while only 12 percent think Government has gone too far. CPSC's current and proposed resource levels are grossly out of line with public opinion.

Second, CPSC has the highest consumer rating of any major Federal consumer protection agency. Of course, I must point out that Consumers Union is at the top of the list.

Consumers are more intelligent than we give them credit for. They recognize that safety hazards are often the one dimension of a product that they cannot measure at the point of purchase. They recognize that they have little or no leverage with which to affect change. They recognize and appreciate CPSC's work. Congress should respond favorably to this clear message from the consumer.

Consumers Union and I urge you to reauthorize the agency as an independent regulatory agency for 5 years with an authorization level commensurate with its mission, and I could not agree more with Mr. Smith that money needs to be provided to the Commission to answer the questions. Where Mr. Smith and I disagree is that I think the answer needs to be found.

Thank you very much for your attention.

Senator KASTEN. David, thank you.

My understanding is that the Consumer Product Safety Commission has never been reauthorized for more than 3 years. Is that correct?



Dr. PITTLE. Yes, but you have the power to make it longer. That is correct, it was never authorized for more than 3 years.

Senator KASTEN. Perhaps you or Susan could respond. What other regulatory agencies have ever had that—I do not know where the magic 5 years came from, but that is what a number of people are talking about today. Are there other regulatory agencies that have been authorized or reauthorized for a period as long as 5 years? It is my understanding that that is a little bit longer than we have even gone with some of the more stable agencies.

Ms. KING. I do not know of any, Mr. Chairman. I think a point that a number of us would like to make is the Commission desperately needs some stability at this point, not to question from year to year whether it will continue to exist. When the Commission is undertaking long-term commitments to research and addressing issues, it is very unquieting and disorienting to the industries involved. It does not serve their interest to have things up and down and on and off all the time.

I think oversight can be as comprehensive every year as this committee has always made it to be. That is, the oversight function is independent of the authorization. I think the Commission desperately needs some certainty.

Senator KASTEN. We are in a different position, as I said in my earlier comments. We are in a different position in terms of the direction we will be going in now with the agency than we were a couple of years ago. I am just trying to figure out where the magic 5 years came from. I know it is coming from two or three different places and obviously someone has thought about coordinating it, and I just do not know where 5 years came from, when there is no precedent that I know of for a period of time that long.

David?

Dr. PITTLE. Five is obviously more than two. Having gone through the last reauthorization only 2 years ago, I know that by the time we got over it we were beginning to spend some of our meager resources just getting prepared for the one that was coming up almost just the next year.

The agency is constantly off balance. It is one thing to be coming up here for oversight, which I believe is a fair and appropriate thing for us to do, but to have the reauthorization question constantly hanging over us means, as Susan points out, that you cannot take a longer view.

The agency is not going to get to the end of its job in 2 or 3 or 5 years. There is so much work here to be done, there are so many death certificates and injury reports that need to be addressed that a longer reauthorization period is really what is desired. Four would be OK, as well. It should not be two. It should not be one. A number greater than three—I mean——

Senator KASTEN. Go for 10. I do not understand where five comes from, that is all. We have answered the question: five is just what people have talked about. There is not a precedent for it. There is not a reason for it. That is just a number that everybody has settled in on today. Is that right?

Dr. PITTLE. That is right. But it is also a spirit that it should be longer, and it should be recognized as a permanent activity.

Senator KASTEN. I understand.

On behalf of the subcommittee I would like to thank particularly the Commissioners, but also all of the panelists who have taken the time and effort to testify here today. I know a number of you have come from out of town. We have heard thoughtful comments from virtually every interested group. The comments will be a key factor as we begin to develop a reauthorization bill, and I particularly appreciate your comments with regard to the time.

As all of you understand, the record of the hearing will be kept open so that members of the subcommittee who were not able to be here today may submit questions to be answered for the record. There are also a number of questions that I did not have a chance to ask that I had hoped to ask but we ran out of time.

I hope that we can get the questions back to the subcommittee within roughly a 2-week period of time so that the staff and all of us can move forward with this reauthorization.

Senator KASTEN. Thank you all very much. The hearing is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

## ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

### STATEMENT OF AMERICAN TEXTILE MANUFACTURERS INSTITUTE

We appreciate the opportunity to submit this statement for inclusion in the printed record of hearings on the reauthorization of the Consumer Product Safety Commission. We wish to express our support for continuation of the agency.

The American Textile Manufacturers Institute (ATMI) is the national, central trade association representing spinners, weavers, knitters, tufters and finishers that collectively manufacture approximately 85 percent of the textile production in the United States. Being the nation's 10th largest employer, the American textile industry represents a major industrial segment of the economy.

ATMI has worked with the Commission in many areas including its chronic hazard program on formaldehyde and its flammability program on apparel, carpet, rugs and upholstery. We appreciate the cooperation we have received in recent years in these areas and hope the agency will continue to consider our positions when solving safety problems.

The Institute favors many of the reforms contained in the 1981 reauthorization legislation and urges their continuance. We are particularly supportive of the preference for voluntary solutions when a problem exists.

### STATEMENT OF THE CHAIN SAW MANUFACTURERS ASSOCIATION

On behalf of the Chain Saw Manufacturers Association ("CSMA"), I want to convey the industry's deep appreciation for the invitation once again to participate in the important deliberations of the Consumer Subcommittee as it considers the reauthorization of the Consumer Product Safety Commission ("CPSC" or the "Commission"). CSMA is the national, non-profit trade association representing the majority of manufacturers of chain saws and their component parts for the consumer and professional markets. We offer our views today not as a passive observer of the Commission's performance but as a direct participant with the agency in an exceedingly difficult undertaking: to define, analyze and ultimately control the phenomenon known as chain saw kickback. Although the industry first grappled with the complex engineering problems involving kickback long before the Commission came into existence, our joint efforts can be traced to the time—now six years ago—when the Commission was petitioned to commence a mandatory standard proceeding to address the risk of injury associated with kickback.

When CSMA last appeared before this Subcommittee at the 1981 reauthorization hearings, the industry had little reason to be optimistic about the prospect of enlisting the Commission's active participation in the voluntary standard development process. A Notice of Intent had recently been published by the Commission, 45 Fed. Reg. 62392 (Sept. 18, 1980), announcing its aim to supplant the voluntary standard process through mandatory rulemaking.

During the balance of 1980 and 1981, CSMA continued to sustain its technical program to understand and eliminate or adequately reduce the risks of injury associated with chain saw kickback. CSMA chose to continue its technical program in the face of continued opposition by the Commissioners to the development of a voluntary standard for several reasons including, among others: (1) CSMA has a long-standing commitment to the voluntary standards process; (2) basic research is essential to any standards project, voluntary or mandatory, in order to develop reliable testing equipment and procedures; (3) CSMA wanted to submit the best possible draft to the American National Standards Institute for promulgation as an American National Standard. During this period of time, CSMA continued to provide periodic technical reports to CPSC.

On May 11, 1981, the Commission again published a Federal Register Notice and announced their intention to develop a mandatory standard for chain saws. On June 10, 1981 CSMA submitted its comments and requested the Commission to reconsider its course of action. We emphasized that the CPSC information base was outdated, and that the Commission should undertake a comprehensive evaluation of



chain saw technology incorporated in presently produced products before proceeding to write a mandatory standard.

In December of 1981, CSMA submitted a draft industry standard for chain saw kickback to a national consensus standard-setting committee (ANSI B175.1), which incorporated the results of years of intensive research and analysis. This committee is comprised of 23 individuals including representatives from four federal agencies (CPSC, OSHA, National Bureau of Standards, U.S. Forest Service), three universities (Pennsylvania State University, University of Rhode Island, Virginia Polytechnic Institute), and other interested associations such as the American Pulpwood Association, which represents professional loggers.

In January of 1982, the Commission staff's Powered Equipment Team submitted to the Commissioners a detailed evaluation of the industry draft standard, and unequivocally recommended that the Commission direct the staff to work with the voluntary standard committee to consider, and amend if necessary, the draft standard in lieu of mandatory standard development. In the January 28, 1982 briefing package submitted by the Office of Program Management to the Commission, the chief issue for resolution by the Commission was framed simply and directly:

"Whether to participate with industry in upgrading the voluntary standard for chain saw kickback or issue an advance notice of proposed rule making."

The conclusion was equally straightforward:

"Based upon the Commission Staff's preliminary assessment of the kickback amendments, the powered Equipment Team recommends that the Commission direct the staff to work with CSMA and the ANSI B175 Committee to upgrade this chain saw standard to address chain saw kickback."

The CPSC staff was substantially in accord with the proposed test methodology and equipment, and found that significant improvements in the design, comprehensiveness and predictive power of the newly revised computer model would provide a reasonable basis for development of a voluntary performance standard.

Rejecting the straightforward recommendations of the staff, the Commissioners recommended that a mandatory proceeding be initiated through the development and publication of an Advance Notice of Proposed Rulemaking ("ANPR"). On May 5, 1982, the Commission's notice was published in the Federal Register. The notice did not signal any disagreement on the Commission's part with the technical evaluations of its staff. We believe that the decision of the Commissioners to direct the initiation of a mandatory standards project is not in accord with the expressed congressional preference of voluntary product safety standards contained in the 1981 amendments to the Consumer Product Safety Act.

A brief review of the comments made during the course of the Commission's 1981 reauthorization hearings demonstrates the unmistakable Congressional intent to favor voluntary consumer product safety standards over mandatory agency action.

Congressman Broyhill remarked during the House hearings:

"All of us, of course, want assurance that the products we buy are safe. We should also be concerned of over regulation; that is, regulations which add undue cost to consumers or stifle innovation and competition. We should also be concerned by either the attempt or lack of attempts on the part of this particular agency to work with industry, try to achieve the goals that we all have on a voluntary basis."

The following colloquy then occurred between Congressman Broyhill and former Commission Chairman King:

"The Commission [would have] to consider the merits of existing voluntary standards before it promulgates a mandatory standard. What this section would do would be to prohibit the agency from imposing a mandatory standard unless the agency finds that compliance with an existing voluntary standard will not eliminate or will not reduce the risk of injury, or that it is unlikely there will be sufficient compliance with voluntary standards within that industry group. Would you comment on that provision?"

[Chairman King]:

"I think this shifts the burden so that the Commission would have to make the finding that the industry cannot do it, rather than industry informally trying to convince the Commission that it can do it. It shifts the formal burden to the Commission."

In parallel Senate hearings, the point was even more forcefully made that mandatory standards were to be developed with the utmost restraint and as a "last resort". As Senator Ford observed:

"Another concern I would like to see addressed is the use of voluntary standards. Three years ago, I stressed that the use of mandatory standards should be a last resort after exhaustion of all available opportunities to achieve the desired result."

"Three years ago, I also introduced legislation to encourage the acceptance of voluntary standards. What we wanted to do is get to where we are beginning to see results today. The CPSC acknowledges the importance of voluntary standards as [Commissioner] Sam [Zagoria] said, as you begin to squeeze this agency down in dollars it has to spend, the voluntary standard becomes a better deal.

And Chairman Kasten summarized the sense of the Committee in similarly direct language:

"I just wanted to make sure that we are all on the right track here going toward voluntary standards. It seems we are. I think the Commission is going in that direction as well."

Given the substantial legislative sentiment favoring the adoption of voluntary standards, as well as the statutory reforms in the CPSA that mandate full evaluation of such standards prior to initiation of a formal rulemaking, CSMA found it difficult to understand why the Commissioners would embark on an independent program effort to develop a mandatory standard.

On July 6, 1982, CSMA responded to the Commission's May Notice. CSMA's comments included an independent analysis of the CPSC injury data systems. (See attachment A)<sup>1</sup> Among the major conclusions of this independent report were these findings:

1. Application of statistical time series test to NEISS injury data refutes the Commission staff's thesis that chain saw injuries have increased over time. Especially for the last four years, statistically significant declines in chain saw injuries are observable.

2. Analysis of individual NEISS hospital data also reveals a decline in total chain saw injuries for the most recent reporting period available.

3. When total saw associated injury patterns over time are adjusted for the substantial increases and the stock of usable saws occurring during the last decade, the resulting use adjusted trend in injuries is declining to a significant extent.

4. Independent analysis of CPSC death data, taking into account the increases in total chain saw stock and increases in total reported incidents for all products from a death certificate program, does not support the Commission staff's assessment that chain saw associated deaths have increased over a period of time.

These independent findings were in striking contrast to the Commission's assertion in the Federal Register notice that "the estimated number of injuries involving chain saws almost doubled between 1976 and 1981." The downward trend in product associated injuries that was observed in the independent study becomes even more significant when viewed in light of changing product technology. Indeed, the industry's longstanding commitment to research, development and application of new safety technologies, as well as broad compliance with the current American National Voluntary Standard, have contributed substantially to the declining injury rate. In short, there appeared to be little sense, and less statutory justification, in declaring that existing standards are not up to the needs of product safety when the Commission did not attempt to find the functional relationship between new technology, existing standards, and their relationship to injuries associated with chain saws. To date, the ANPR on chain saws has not been withdrawn.

Although the events of the last two years compel us to conclude that old regulatory habits die slowly, CSMA and other interested members of the industry have continued to cooperate with the Commission on this project of mutual concern, particularly with the technical staff. Indeed, cooperation at the engineering level has seldom, if ever, been closer or more productive, even though affairs at the policy making level remain somewhat ambiguous. By issuing the Advance Notice of Proposed Rulemaking while simultaneously directing the staff to support the final development of an effective voluntary standard, the Commission has cast an unnecessary pall over the voluntary standards setting process. The recent characterization made at the hearing on February 25, of this duplicative procedure—the "club in the closet" approach—perhaps illustrates best the Commission's reluctant approach to its new congressional mandate.

The proper business of the Commission should be to determine (1) whether the draft voluntary standard is now likely to result in the elimination or adequate reduction of risks associated with kickback-related injuries, and (2) whether substantial industry compliance with the final voluntary standard will be achieved. The American National Standard Committee's work should not be hampered by concerns that the voluntary standard will be found acceptable to the Commission in all but one or two particulars, then converted at the last minute into a mandatory standard incorporating changes to suit the Agency's regulatory disposition. This

<sup>1</sup> The attachment has been retained in the Committee files.

crude carrot-and-stick approach violates the legislative directive that the Commission adopt mandatory standards with the utmost restraint and only as a last resort.

Part of the problem can perhaps be traced to a lack of authoritative guidance from Congress as to how voluntary standards are to be developed and implemented. Former Chairman King said, during the course of the 1981 House reauthorization hearings, that section 9(b)(2) of the CPSA: "shifts the burden so that the Commission would have to make the finding that the industry cannot do it, rather than industry informally trying to convince the Commission that it can do it. It shifts the formal burden to the Commission."

This is a useful way of expressing the Commission's obligations in a concrete way. If the Commission cannot satisfy its burden of proof, then the Commission is under an affirmative duty to terminate a mandatory rulemaking proceeding.

We believe that the Subcommittee should consider amendment section 9 of the CPSA in order to define with greater precision when the Commission shall rely on voluntary product safety standards. For example, the Committee should consider directing the Commission to determine whether products that comply with an existing voluntary standard are associated with the injury pattern at issue. In those cases where there are no data in the Commission's injury files on products complying with existing standards, a presumption should arise that the voluntary standard is effective in either eliminating or reducing the risk of injury. On the other hand, if products that comply with existing standards are continuing to be reported through the Commission's injury data systems, a presumption should arise that some form of action is warranted.

The Subcommittee would perform a valuable service by directing the Commission by statute to promulgate agency regulations implementing the 1981 amendments on voluntary standards. The Commission's regulations in this area predate the 1981 CPSA amendments by 3 years, 43 Fed. Reg. 19216 (May 4, 1978), *codified at* 16 C.F.R. Part 1032, and do not begin to reflect the profound changes in its standards-setting authority which occurred in 1981. The absence of decisive Commission action to amend its voluntary standards regulations reflects, we fear, an ingrained agency reluctance to modify its historical preference for mandatory product safety standards despite statutory directives to the contrary.

A final area of CSMA concern is the Commission's continued practice of making public statements about the class of products known as "chain saws". During the last several years, Commissioners and individual staff members have continued to express views with respect to the estimated number of injuries associated with chain saws. For example, in the May 5, 1982 Federal Register notice, CPSC made the following statement:

"During 1981, an estimated 123,000 people required medical attention from injuries associated with chain saws (6) this includes injuries treated in hospital emergency rooms and those treated in doctor's offices. The estimated number of injuries involving chain saws almost doubled between 1976 and 1981 (6). Based upon 1978 data, 23% of the reported injuries were believed to be associated with kickbacks (7)."

CSMA does not consider statements made by an employee of CPSC, either a Commissioner or a staff member, to be inaccurate or misleading when that statement is based upon valid statistical extrapolations. We do consider, however, the incomplete nature of the statement set forth above to be both inaccurate and unreliable. This statement does not, for example, contain information on the number of actual reports in the Commission's files. There is no indication whatsoever that these statistical extrapolations do not have any relationship with cause and effect analysis. Moreover, there is no public explanation by the Commission as to how they arrived at the 1981 estimates of 123,000 people requiring medical attention from injuries associated with chain saws.

To correct the Commission's persistent misuse of injury data, CSMA recently suggested in comments filed in response to the Commission's proposed information disclosure rules under section 6(b) of the CPSA (See Attachment B),<sup>2</sup> that the following language should accompany any oral or written dissemination concerning injury information and/or risk of injury:

"These injury estimates are based exclusively on product-coded data gathered from emergency room treatments at [73, or current number] hospitals through the National Electronic Injury Surveillance System ("NEISS"). The actual number of emergency room treatments involving this product that were reported to CPSC during [a specified time period] is \_\_\_\_\_. CPSC has employed certain statistical techniques, first, to project from the actual reports the total number of medically

<sup>2</sup> Attachment B is in the Committee files.



attended injuries nationally, and, second, to project the total number of medically attended injuries nationally. The estimated error in these injury estimates is plus or minus ——— percent at 95 percent level of confidence. Neither the NEISS nor the projections of medically attended injuries derived from the NEISS deal with cause-and-effect relationships."

CSMA does not believe that the incorporation of the clarifying language set forth above would place any restrictions or burden on the individual commissioners or staff. Indeed, we believe that the general public would be provided with a far more complete, accurate and reliable statement concerning chain saws or any other products.

In closing, CSMA believe that the performance of the U.S. Consumer Product Safety Commission will continue to improve if the few recommendations set forth above are approved by the committee. CSMA does not support the abolition of the U.S. Consumer Product Safety Commission. To the contrary, we believe that CPSC provides a valuable mechanism at the federal level to improve the consciousness of consumer product safety, a forum where manufacturers of consumer products can work with the federal government to develop and implement voluntary safety standards, and a means by which accurate and reliable information may be publicly disseminated. Nonetheless, given the agency's irresolute approach to the voluntary standards process and its present effort to retreat to a pre-GTE Sylvania position on disclosure of product information—in contravention of the 1981 amendments—CSMA firmly believes that the Commission should not be reauthorized for a period exceeding 2 years. The need for Agency accountability and continuity of oversight by this Subcommittee will be frustrated if the Commission's request for an unprecedented 5 year lease on life is granted.

If the Committee has any questions for CSMA, we would be happy to respond to such inquiries.

#### STATEMENT OF GEORGIA-PACIFIC CORPORATION

##### INTRODUCTION AND OVERVIEW

Georgia-Pacific Corporation appreciates the opportunity to provide its perspective on on-going regulation by the Consumer Product Safety Commission and in particular CPSC's present activity on pressed wood products such as hardwood plywood, particleboard, and fiberboard.

We are submitting this statement because we are concerned that CPSC, having banned urea-formaldehyde foam insulation (UFFI) on the basis of an alleged unreasonable risk of cancer and acute effects, is now embarked on a study of other formaldehyde products and, in particular, pressed wood products, using the same questionable risk assessment methodology and review process. (CPSC's ban has been challenged by the Formaldehyde Institute, of which Georgia-Pacific is a member, in the U.S. Court of Appeals for the Fifth Circuit.) We are concerned that CPSC's use of the same risk assessment methodology in the pressed wood products rulemaking could result in a similarly unwarranted rule with respect to pressed wood products.

Our comments address the following issues:

- (i) Background information concerning the various uses and health effects of formaldehyde;
- (ii) The economic implications of regulation of pressed wood products, not only for industry but also for homeowners;
- (iii) The need for careful review of the scientific data;
- (iv) The deficiencies in CPSC's risk assessment methodology, and its misuse of quantitative risk assessment;
- (v) Concerns that CPSC in its examination of pressed wood products in manufactured housing is exceeding its statutory jurisdiction; and
- (vi) Concerns that CPSC is failing to comply with procedures mandated by the Federal Hazardous Substances Act.

We believe that the pressed wood products industry has made substantial progress in reducing formaldehyde emissions, to the point that even complaints of minor acute effects (such as irritation symptoms) are very rare. There is no evidence of cancer risk at the low levels of formaldehyde prevailing within homes. CPSC's assertion that cancer will result from formaldehyde exposure is based on speculation derived from a mathematical model improperly applied to the results of tests in which rats developed cancer at very high doses. CPSC's mathematical prediction of cancer risk is based on incorrect assumptions and improper use of statistical techniques. Moreover, CPSC's reliance on its quantitative risk assessment, to the exclusion of

epidemiologic evidence and consideration of other biological data, is a misuse of risk assessment technique. There are important biological differences between man and the rat, and substantial uncertainties exist concerning extrapolation of effects of low-level exposure in man from high-level exposure in rats.

A careful review of the scientific evidence indicates that insignificant health benefits would result from further reductions in emissions of formaldehyde from pressed wood products. Current technology is able to achieve levels of 0.5 ppm or below, which is a currently promulgated regulatory standard for indoor formaldehyde levels in Minnesota. The economic costs of further reductions are enormous, however. In view of the amounts at issue, not only for industry but for homeowners and the consuming public, we urge that CPSC proceed cautiously. In particular, we urge avoidance of unwarranted adverse publicity and attribution of uninvestigated complaints to formaldehyde in wood products. The "indirect regulation" which results from premature adverse publicity can be insidious and just as harmful as a direct ban.

In addition, we urge that CPSC take a hard look now at the parameters of its jurisdiction, before it expands resources and jeopardizes not only the viability of another industry but the value of millions of homes. HUD has exclusive jurisdiction over construction and safety standards for manufactured housing. Moreover, CPSC should also adhere strictly to statutorily-mandated procedures in any activity it does undertake. The Federal Hazardous Substances Act's comprehensive procedures should be observed. Had these procedures been followed in the case of UFFI, CPSC's ban of UFFI might never have been enacted; the lessons of CPSC's UFFI experience should not be lost.

#### I. BACKGROUND ON FORMALDEHYDE

##### A. Formaldehyde and formaldehyde products

Formaldehyde is a basic building block chemical which has been used extensively in the United States for 90 years. More than 50 plants of 14 companies are involved in the direct production of formaldehyde. The estimated capacity of these plants is 8 billion pounds a year, with a value of \$400 million. When the multitude of end-use products is included, companies that manufacture products containing formaldehyde are responsible for employment of 1.4 million individuals with an annual payroll of \$18 billion. The revenues of these companies, producing thousands of industrial goods and consumer products, constitute about 8 percent of the Gross National Product.

If all the chemicals found in nature or synthesized by man were ranked in their order of importance in everyday life, few would outrank formaldehyde. Formaldehyde is ubiquitous. It is produced naturally by the human body as part of the routine metabolic process, and it is commonly encountered in our everyday environment—typically as a product of gas cooking and incomplete combustion, *e.g.*, from automobile exhaust and as a result of smoking or the use of gas stoves and heaters and wood stoves in the home. Because of its ability to provide superior end-use properties and its low cost, formaldehyde has become an indispensable ingredient in the production of thousands of industrial and consumer products.

Approximately one-half of the formaldehyde produced in the United States is used in the preparation of urea-formaldehyde resins. These resins in turn are used in the production of a wide variety of products, including hardwood plywood, particleboard, fiberboard, and permanent press fabrics. Formaldehyde provides the "permanent" in permanent press fabrics, the preservative in shampoo, toothpaste, and cosmetics, and the wet strength and absorbency in paper towels. Formaldehyde-based resins are also used extensively in foundries. In recent years, formaldehyde has been used to manufacture the strong, lightweight plastics needed to reduce the weight of automobiles and to increase gas mileage. To date, no safe substitutes have been found for formaldehyde that are as effective and economical.

In recent years, the pressed wood products industry has made considerable progress in reducing formaldehyde emissions from various products. National Particleboard Association surveys reveal that the industry average of formaldehyde emissions from manufactured housing decking dropped 70% between 1980 and 1982, while emissions from underlayment and industrial board were reduced 60% over the same period. Complaints about acute effects from pressed wood products have not been significant in number viewed against the substantial amount of products which are in use. The industry believes that the low-emitting boards produced will not give rise to even this relatively low number of complaints.

### B. Health Effects

Formaldehyde has been used in the United States for generations without any evidence of nasal cancer or increased incidence of other cancers, despite workplace exposures in the past which are considerably higher than present levels of exposure in the home (or in the workplace). The numerous epidemiologic studies now cover over 11,000 workers. When these studies are viewed collectively, it is significant that all the different types of studies, using differing methodologies, disclosed no causal connection between cancer and formaldehyde. As EPA concluded in connection with its review of formaldehyde pursuant to the Toxic Substances Control Act:

[F]or chemicals of long standing and well defined use, epidemiology could tell if a critical situation exists. If formaldehyde were at potent human risk, this should show up epidemiologically. *There does not appear to be any relationship, based on the existing data base on humans, between exposure and cancer. Real human risk could be considered to be low on such a basis.*<sup>1</sup>

As to acute effects, human studies where volunteers are carefully monitored show that the general population has an irritation threshold of 0.8 to 1.2 ppm. Andersen has demonstrated that even at exposure levels up to 1.6 ppm, only "slight discomfort" was reported. Effects at this level were eye irritation and dryness in the nose and throat, which cleared overnight.<sup>2</sup> Weber-Tschopp found slightly increased "eye blinking" at 1.7 ppm and concluded that the "irritation threshold" is between 1 and 2 ppm.<sup>3</sup> Rader found that "trifling" irritation in the eye, nose and throat were noted at concentrations less than 1 ppm, and concluded that 0.5 to 1 ppm is "inoffensive."<sup>4</sup> Only the rare individual would experience minor irritation effects below 0.5 ppm.

### II. ECONOMIC IMPLICATIONS

The Consumer Federation of America has filed a petition requesting that CPSC promulgate a 0.005 ppm standard on formaldehyde in pressed wood products, which in practical effect would constitute a ban since such extremely low levels are not technically feasible with any commercially available resin system. However, there is no scientific evidence of adverse health effects at levels below 0.5 ppm, an order of magnitude above the CFA suggested level. The Department of Housing and Urban Development is reportedly about to publish a target product standard of 0.3 ppm for particleboard and 0.2 ppm for plywood, tied to a target ambient level of 0.4 ppm. This standard is more than adequate to address any problem of adverse acute effects, much less chronic risk. Minnesota and Wisconsin have promulgated residential standards of 0.5 ppm and 0.4 ppm of formaldehyde respectively to address acute effects.<sup>5</sup>

There is no evidence which would support standards more stringent than the HUD standards—standards which would not be attainable and which would in fact preclude the use of urea-formaldehyde resins in pressed wood products. Pressed wood products made with urea-formaldehyde resins have been used pervasively in the United States over the last thirty years without significant injuries or health problems. The National Particleboard Association reports shipments of 2.87 billion square feet of particleboard in 1981. CPSC has estimated use of 2.66 billion square feet of hardwood plywood in the same year.

It is undeniable that the economic consequences of elimination of formaldehyde content in pressed wood products would be enormous. It has been estimated that the

<sup>1</sup> Memorandum from Dr. John Todhunter, Assistant Administrator, for Toxic Substances, to EPA Administrator Anne Burford (formerly Gorsuch), Feb. 10, 1982, at 11 (emphasis added). EPA concluded that there was "no excess of cancers of any type, in particular nasal or oral, in these groups which can be attributed to formaldehyde exposure when corrected for smoking and drinking." *Id.*

More recently, a report by a Canadian epidemiologist noted that from 1972 to 1979 the Ontario Cancer Registry recorded no deaths due to nasal cancer among physicians, dentists, morticians, and non-M.D. anatomists and pathologists. The report concluded that "if there is a risk of nasal cancer associated with inhalation of formaldehyde vapour it is small." Kreiger, "Formaldehyde and nasal cancer mortality," *Can. Med. A.J.*, Feb. 1, 1983.

<sup>2</sup> Ib Andersen, *Formaldehyde in the Indoor Environment—Health Implications and the Setting of Standards*, in Fanger & Valbjorn (eds.), *Indoor Climate: Effects on Human Comfort, Performance and Health in Residential, Commercial and Light-Industry Buildings* 65-87 (1979).

<sup>3</sup> Weber-Tschopp, et al., "Irritating Effects of Formaldehyde on Humans (trans.)," 39 *International Archives Occupational Environmental Health* 207 (1977).

<sup>4</sup> Jurgen Rader, *Irritative Effects of Formaldehyde in Laboratory Halls, Analytical and Experimental Investigations*, Doctoral Dissertation, University of Wurzburg, Germany (1974).

<sup>5</sup> The Minnesota regulation is in effect. The Wisconsin standard has been temporarily stayed pending appeal after a challenge by the Manufactured Housing Institute.



direct costs of a ban of formaldehyde resins in building products in manufactured housing and conventional home construction would be \$2 billion.<sup>6</sup>

### III. NEED FOR CAREFUL AND OBJECTIVE REVIEW OF THE SCIENTIFIC DATA

Adverse publicity can in effect ban a product without due process and without compliance with the statutory requirement of substantial evidence to support the agency's action. It is of particular importance the CPSC not engage in issuing alarmist public statements and publicizing uninvestigated "complaints," often mere inquiries, as if they were documented cases. Widespread dissemination of alleged complaints generates additional complaints, prejudices the public to conclude that the chemical is a carcinogen prior to any formal finding and without due process, and stirs up litigation. Such publicity not only impairs the marketability of our products, and jeopardizes the value of existing homes, but potentially misleads consumers into attributing to formaldehyde sore throat, nausea, and other common symptoms that may have any number of other causes. We are concerned that in the January, 1983, briefing package to the Commission, the staff relied on unverified complaints, unsystematically compiled without indication of the level (if any) of formaldehyde or other indoor pollutants present, and without critical scrutiny of the wide variety of maladies claimed to be attributable to formaldehyde.

The potential economic impacts for the nation warrant fair and objective evaluation of all available data, including human epidemiologic studies as well as animal data, and development of a comprehensive risk assessment based on all of the data. As CPSC's national toxicology panel on formaldehyde concluded, CPSC's consumer complaints cannot presently be used to establish a cause-effect relationship or the prevalence of symptoms related to formaldehyde in the home. We urge that CPSC re-evaluate its formaldehyde risk assessment after a careful and objective review of all of the scientific evidence, and urge that CPSC consider the establishment of a chronic hazards panel to assist it in this effort.

### IV. CPSC'S QUANTITATIVE RISK ASSESSEMENT

CPSC banned UFFI on the basis that it presents an unreasonable risk to both acute and chronic effects on human beings. Three other federal agencies—the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Food and Drug Administration—have recently reviewed health risks associated with formaldehyde, however, and have determined in effect that the existing evidence does not create a concern of significant risk to human health at prevailing levels of exposure.

CPSC adopted the ban even though it recognized that "[f]ormaldehyde is not one of those substances as to which there is direct evidence of human carcinogenicity."<sup>7</sup> CPSC's assertion—notwithstanding years of reassuring human experience—that formaldehyde poses an unreasonable risk of cancer is based on a speculative mathematical risk assessment. Having used this risk assessment to ban UFFI, CPSC is now using the same model to predict an exaggerated risk of cancer from pressed wood products.<sup>8</sup>

The risk estimate is derived from the results of animal tests in which rats exposed to very high and extremely damaging doses of formaldehyde developed cancer. To calculate risk based on the animal data, CPSC selected an extremely conservative model which is premised on unsupported assumptions. Even that model predicted a

<sup>6</sup> Booz, Allen & Hamilton, Inc., "Scoping Level Estimates of Selected Costs and Other Economic Effects of Potential Regulations Limiting Formaldehyde Exposure," Ch. II (1980). In a report prepared for the Formaldehyde Institute, Booz, Allen estimated both the operating and capital costs for three options altering the use of urea-formaldehyde: using modified urea-formaldehyde (UF) resins, using phenol-formaldehyde (PF) resins, or converting to non-formaldehyde based resins. The use of modified UF resins or treatment of UF products was estimated to increase operating costs by \$100-200 million and capital costs up to \$100 million. Use of PF resins would result in increased operating costs of \$400-500 million and capital costs of \$350-700 million. Switching to non-formaldehyde resins was estimated to increase operating costs by at least \$1.1 billion and \$1 billion in capital costs.

<sup>7</sup> CPSC Brief, at 33, in *Formaldehyde Institute, Inc., et al. v. CPSC*, No. 82-4135 (5th Cir. decision pending).

<sup>8</sup> The Formaldehyde Institute, of which Georgia-Pacific is a member, has vigorously contested the UFFI risk assessment in its challenge of the UFFI ban in the Fifth Circuit Court of Appeals, where a decision is pending. However, even if the risk assessment generated months ago in connection with the ban of UFFI had been properly derived and applied, the recent additional epidemiology studies and the recent research on the mechanism of the carcinogenicity of formaldehyde require a re-evaluation of CPSC's cancer risk assessment.

most likely risk of zero. CPSC then used a further mathematical construct (a 95 percent upper confidence limit) in order to derive an estimate of risk other than zero.

Aside from the methodological deficiencies in the mathematical risk assessment itself, CPSC's exclusive reliance on the quantitative assessment is a misuse of risk assessment principles. CPSC ignored important qualitative factors such as the biological differences between man and the rat and the expensive epidemiologic evidence.

In making the extrapolation not only from rat to man but also from high doses to low doses, CPSC's risk assessment is a numbers game, founded on mathematical speculation. To appreciate the "conservative" exaggeration reflected in CPSC's risk assessment, it is necessary, first, to review objectively the existing evidence on the carcinogenicity of formaldehyde and, second, to examine the fundamental premises of CPSC's risk assessment.

#### A. The biological data

In tests conducted by the Chemical Industry Institute of Toxicology (CIIT), a statistically significant number of rats exposed for virtually a lifetime to cytotoxic doses<sup>9</sup> of 15 ppm—doses much higher than man is exposed to—developed nasal cancer.<sup>10</sup> CPSC contends that these tests indicate unreasonable risk of cancer to man at far lower levels of exposure. As the Supreme Court has stated, however, literally thousands of substances are suspected of causing cancer in animals and potentially in humans at high doses.<sup>11</sup> The fact that humans are exposed to a chemical that is identified as a rodent carcinogen does not necessarily mean that the humans have an increased risk of contracting cancer or that any such risk can be accurately or meaningfully quantified.

For many reasons, the fact that rats develop nasal cancer at 15 ppm does not indicate significant cancer risk to man at lower doses. First, man could not tolerate exposure to 15 ppm. Second, there is a direct dose-response relationship to the CIIT results. While formaldehyde apparently led to cancer in 44 percent of the rats at 15 ppm, there was no statistically significant incidence of cancer in rats at 5.6 ppm, nor any incidence at 2 ppm. There was no statistically significant incidence of cancer in mice at any dose—even at lifetime exposure to 15 ppm. Thus, below 5.6 ppm, no cancer even in animals is attributable to formaldehyde.

Third, there is evidence that the cancer observed in rats at high doses is due to the cytotoxic effects of those high doses, thus suggesting that cancer will not occur at lower levels which do not cause cytotoxic effects. In the CIIT study, high doses of formaldehyde caused acute injury and death of cells in the rats' nasal cavities; surviving cells, probably injured, then divided to replace the dead cells. CIIT scientists regard this cell death and attendant proliferation of injured cells as an essential precondition to the cancer observed.<sup>12</sup> Moreover, there is also substantial evidence of several biological protective mechanisms (e.g., cell repair, detoxification, mucus reactions with formaldehyde, and immunologic, tumor-associated rejection mechanisms) that prevent or mitigate carcinogenic effects at low exposure levels.<sup>13</sup> At high doses, however, these protective mechanisms are overwhelmed.

Fourth, any assumption that man will respond to formaldehyde in the same manner as the rat, an obligatory nose breather, is erroneous. It is significant that the CIIT (and other) studies demonstrate considerable variation in response even among rodent species. According to these studies, the mouse and the hamster have been less sensitive than the rat. The different response in mice apparently reflects the fact that what is important is the dose that reaches the target organ, not the concentration of formaldehyde in the air. The mouse must be exposed to twice the concentration in air to which the rat is exposed to achieve similar effects on nasal tissues, even though both species are obligatory nose breathers.

<sup>9</sup> Cytotoxicity is the capacity to induce cell death.

<sup>10</sup> Battelle Memorial Institute, *Final Report on A Chronic Inhalation Toxicology Study in Rats and Mice Exposed to Formaldehyde* to Chemical Industry Institute of Toxicology, revised Dec. 31, 1981.

<sup>11</sup> *Industrial Union Dept. AFL-CIO v. American Petroleum Institute* ("Benzene"), 448 U.S. 607, 645 (1980).

<sup>12</sup> See, e.g., Swenberg, "Mechanisms of Formaldehyde Toxicity," Third CIIT Conference on Formaldehyde Toxicity (Nov. 21, 1980); Swenberg, "Cell Turnover in Mucosa Induced by Formaldehyde," Formaldehyde Toxicology Seminar, Nov. 1982.

<sup>13</sup> For example, the nasal mucus acts as a protective barrier against low concentrations of formaldehyde, but becomes saturated and permits formaldehyde to reach the epithelial cells at high concentrations. See Morgan, "Formaldehyde and the Mucociliary Apparatus," Formaldehyde Toxicology Seminar, Nov. 1982.

### B. The epidemiologic data

Nasal cancer is extremely rare, amounting to approximately 250 cases in the United States per year. If formaldehyde were indeed posing a risk of nasal cancer of the magnitude predicted by CPSC, one would expect to see a much greater incidence. The fact that the incidence is so rare in man further highlights inter-species differences<sup>14</sup> and tends to confirm that present levels of exposure do not present significant cancer risk.

No epidemiologic study has attributed any nasal or respiratory cancer to formaldehyde, and the incidence of overall respiratory tract cancers in these studies has been normal or lower than expected. For example, a study of 2,490 formaldehyde workers by Dr. Marsh found no nasal cancer and no dose-response relationship between formaldehyde exposure and respiratory or other cancer.<sup>15</sup> Similarly, a study of 2,026 formaldehyde workers by Dr. Wong found no nasal cancer mortality or excess respiratory cancer mortality.<sup>16</sup> A study of 1,106 morticians by Doctors Walrath and Fraumeni of the National Cancer Institute also disclosed no nasal cancer mortality or unusual level of respiratory cancer mortality.<sup>17</sup>

Subsequent to the ban of UFFI, two additional significant mortality studies have been issued. One study analyzed 481 cancer deaths among DuPont employees who had worked with formaldehyde for at least five years. Particularly in the early years studied, many of the workers had been exposed to concentrations exceeding current workplace limits of 3 ppm, and substantially in excess of current residential levels. Mortality rates among the formaldehyde workers were no higher than among other workers.<sup>18</sup> The statistical power of this study was comparable to what could be expected from a cohort study of 2,650 formaldehyde workers followed for at least twenty years.

In December, 1982, Dr. Richard J. Levine, chief epidemiologist at CIIT, published the results of his study of a group of 1,477 male embalmers licensed in Ontario between 1928 and 1957 who were exposed to formaldehyde for a total of 44,306 man-years.<sup>19</sup> The study disclosed no deaths due to nasal cancer, and no increase in any type of cancer in the study group as compared to the general population. Mortality attributed to cancers of the buccal cavity, pharynx, larynx, and respiratory system exclusive of the trachea, bronchus, and lung was less than would normally be expected.

The numerous epidemiologic studies now cover about 11,000 formaldehyde workers,<sup>20</sup> with no indication of causal connection between nasal cancer and formaldehyde, and no statistically significant excess of other cancer which may fairly be attributed to formaldehyde. When these studies are viewed collectively, it is significant that all the different types of studies, using differing methodologies, still disclosed no causal connection between nasal cancer and formaldehyde. As EPA concluded in connection with its review of formaldehyde pursuant to the Toxic Substances Control Act:

[F]or chemicals of long standing and well defined use, epidemiology could tell if a critical situation exists. If formaldehyde were a potent human risk, this

<sup>14</sup> Dr. John Higginson, former director of the International Agency for Research on Cancer, has pointed out the dangers of extrapolating from data on a single species of animals to predict effects on man. In a letter dated February 12, 1982, to CPSC Chairman Steorts, Dr. Higginson stated that:

"Today few experienced experimental oncologists would make any attempt to extrapolate mathematically the degree of human risk from animals, although such attempts were fashionable among biostatisticians in the early '70's when the complexities inherent in modern theories of carcinogenesis in man were not appreciated. Exact estimates as to the number of cases of a cancer that might be expected to occur in man based on a single experiment are silly and simply ignore biological realities."

<sup>15</sup> Dr. Gary M. Marsh, "Proportional Mortality Among Chemical Workers Exposed to Formaldehyde," Third CIIT Conference on Formaldehyde Toxicology (Nov. 21, 1980).

<sup>16</sup> Dr. Otto Wong, "An Epidemiologic Mortality Study of a Cohort of Chemical Workers Potentially Exposed to Formaldehyde, with a Discussion on SMR and PMR," Third CIIT Conference on Formaldehyde Toxicology (Nov. 21, 1980), at 15. For the final version of this study, see Tabershaw Associates, Inc., *Historical Prospective Mortality Study of Past and Present Employees of the Celanese Chemical and Plastics Plant Located in Bishop, Texas* (Sept. 3, 1982).

<sup>17</sup> Dr. Judy Walrath and Dr. Joseph F. Fraumeni, Jr., "Proportionate Mortality Among New York Embalmers," Third CIIT Conference on Formaldehyde Toxicology (Nov. 21, 1980).

<sup>18</sup> William E. Fayerweather, et al., "Case-Control Study of Cancer Deaths in DuPont Workers, with Potential Exposure to Formaldehyde" (Dec. 3, 1982).

<sup>19</sup> Dr. Richard J. Levine, "Mortality of Ontario Undertakers," *CIIT Activities* (December, 1982), at 3-5.

<sup>20</sup> In addition to the studies described above, other studies with smaller cohorts have also been negative.



should show up epidemiologically. *There does not appear to be any relationship, based on the existing data base on humans, between exposure and cancer.* Real human risk could be considered to be low on such a basis.<sup>21</sup>

### C. Assumptions of the CPSC risk assessment

There is therefore no direct evidence of cancer risk from either human experience or animal data at the low levels of exposure found in residences. CPSC confirms this statement, yet it asserts there is a cancer risk, based on a theoretical mathematical model and extrapolation from the CIIT rodent data. Although other models "fit" the data equally well, CPSC in its UFFI risk assessment chose the model that would yield the highest estimate of risk. Even that model predicted a most likely risk of "essentially zero." Ignoring that prediction, CPSC instead chose the 95% upper confidence limit as the estimate of risk, because only that methodology would accommodate its hypothesis of "low dose linearity" and predict that the only point where there is zero risk is zero exposure.

For CPSC's predication of cancer risk to be valid, a number of key assumptions underlying its risk assessment model would have to be valid, including (i) that there is "no effect" level (i.e., no level below which formaldehyde does not pose a cancer risk to man); (ii) that formaldehyde is both an initiator and a promoter of cancer; (iii) that the delivered dose to the target site is directly proportional to the administered (ambient) dose; (iv) that formaldehyde is genetically toxic; and (v) that its effect is additive to (and acts by the same mechanism as) other carcinogens to which man is exposed.

Recent independent research—much of it released at a November 3, 1982, Toxicology Seminar sponsored by the Formaldehyde Institute—rebutts each of these assumptions.<sup>22</sup>

The new CIIT research confirms earlier indications that the cancer observed in rats at high doses is due to the cytotoxic effects of these high doses. Dr. James Swenberg of CIIT has found that exposure to high doses of formaldehyde leads to acute cell injury and cell death in the nasal cavities of rats. The response to this cell loss is compensatory cell replication, as the surviving cells undergo division in order to replace the dead cells. Dr. Swenberg's research indicates that a dramatic increase in cell replication occurs in rats only at high levels of formaldehyde exposure. Since cell proliferation is a requirement for expression of chemical carcinogenicity,<sup>23</sup> this study is important evidence that formaldehyde is carcinogenic in rats only at high doses.

Research by Dr. Kevin Morgan of CIIT indicates that nasal mucus acts as a saturable protective barrier against low concentrations of inhaled formaldehyde. The nasal mucus is normally moved through the nose by cilia. At low concentrations (e.g., 0.5 ppm tested in the rats), there is no effect on the flow of the mucous layer. Inhaled formaldehyde is readily inactivated by the mucous layer; it does not reach the nasal epithelium, and thus would not penetrate cell membranes and other barriers in amounts necessary for causation of cancer. However, at high inhaled formaldehyde concentrations (e.g., 15 ppm in the rat), the mucous flows stops. The capacity of the mucous layer to absorb formaldehyde (i.e., saturation) is reached, and formaldehyde contacts the epithelial layer and kills cells. In contrast, at low concentrations, the mucous layer appears to provide a fully effective protective barrier; at the very least, it greatly changes the ratio of the administered dose to the delivered dose.

<sup>21</sup> Memorandum from Dr. John Todhunter, Assistant Administrator for Toxic Substances, to EPA Administrator Burford, Feb. 10, 1982, at 11 (emphasis added). EPA concluded that there was "no excess of cancers of any type, in particular nasal or oral, in these groups which can be attributed to formaldehyde exposure when corrected for smoking and drinking." *Id.*

<sup>22</sup> By letter dated January 5, 1983, the Formaldehyde Institute submitted a summary of these studies to CPSC. The studies discussed below were all presented at the November 3, 1982 Toxicology Seminar except as noted.

<sup>23</sup> In a letter to CPSC on February 4, 1982, CIIT had indicated:

"The fact that only exposure concentrations associated with squamous cell carcinoma in rats and mice resulted in increased cell proliferation lends strong support to the hypothesis that *increased cell proliferation is a critical event in formaldehyde carcinogenesis*. . . . It would appear than, that formaldehyde concentration is the most important consideration in determining response and the response changes drastically when toxic concentrations are achieved.

"The fact that the irritant effects of formaldehyde disappear after the first few days of exposure is not significant. The crucial phenomenon noted by CIIT is that the increased cell proliferation set in motion by the initial ulceration occurs at every exposure level at which cancer developed, and that without cell proliferation from high-level exposure, no cancer in rats will result."

Recent research by Dr. Thomas Starr of CIIT has highlighted the importance of the delivered dose (the amount of an airborne substance that actually reaches target sites in animal inhalation studies) in performing a cancer risk assessment. CPSC's risk assessment uses the concentrations of formaldehyde in the air (*i.e.*, the administered doses) in extrapolating effects from high to low doses. CPSC's assumption of strict linear proportionality between the administered doses and the delivered doses is an essential proposition for its linear-through-zero hypothesis.

However, as noted above, Dr. Morgan's study on nasal mucus shows this key assumption to be clearly erroneous. Moreover, the fact that mice did not develop cancer at levels which produced cancer in rats is inconsistent with CPSC's assumption; at high doses, mice (unlike rats) reduce their breathing rate substantially and thus reduce the actual delivered dose within the nasal cavity. Thus, the biological data show that there are non-linear and species-specific relationships between administered and delivered doses. Dr. Starr found that correction for the assumption that there is strict linear proportionality between delivered and administered doses has a dramatic impact on quantitative risk assessment such as that used by CPSC in banning UFFI. Changing this assumption in keeping with the results of this new study greatly reduces projected risks at low concentrations.

Another key assumption of CPSC's risk assessment is the assumption that formaldehyde is both an "initiator" and a "promoter" of cancer. Doctors E. F. Spangler and J. M. Ward, respectively of Microbiological Associates and the National Cancer Institute, studied female mice to test whether formaldehyde acts as an initiator of skin cancer, a promoter of skin cancer, or both. The SENCAR mouse was chosen because of its extreme sensitivity to two-stage skin cancer. After 48 weeks of the 78-week study, comparison of skin treated mice with control mice indicates that formaldehyde is not acting as an initiator, and may or may not be a weak promoter of skin cancer in SENCAR mice. Similarly, N. D. Krivanek, J. W. McAlack and N. C. Chromey of Du Pont tested the ability of formaldehyde to initiate and/or promote skin cancer in CD-1 female mice. The study revealed that formaldehyde is acting as neither an initiator nor a promoter. There were no significant differences in mortality between control and treated groups.

Dr. Walden E. Dalbey of Oak Ridge National Laboratory studied the effect of formaldehyde on male Syrian golden hamsters.<sup>24</sup> Lifetime exposure to 30 ppm for five hours once a week produced no tumors anywhere in the respiratory tract, discrediting CPSC's assumption that formaldehyde is an initiator. Similarly, exposure to 10 ppm five times a week for life resulted in no tumors. Dr. Dalbey concluded that there was "no evidence of carcinogenic activity" by formaldehyde.<sup>25</sup>

A study by Litton Bionetics evaluated the genetic effects of inhaled formaldehyde *in vivo* (in live animals).<sup>26</sup> Previous mutagenicity tests in *in vitro* (test tube) produced both positive and negative results. The final report, issued by Litton Bionetics on May 14, 1982, is not consistent with another of the key assumptions of CPSC's risk assessment, that formaldehyde is mutagenic in *in vivo* and therefore should be presumed to interact with genetic material to produce cancer in animals and humans at low doses. No significant increases in sister chromatid exchanges, an extremely sensitive indicator of mutagenetic potential, were observed by Litton Bionetics in whole animals at exposure levels up to 25 ppm. At dose levels well above 25 ppm, mutagenic activity appeared and coincided with severe acute toxicity. It appears that in living animals (but not in the test tube experiments), the presence of various defense mechanisms (such as metabolic deactivation of inhaled formaldehyde and cellular repair processes, as well as the protective action of mucus described above) affect the action of the formaldehyde. Thus, the Litton Bionetics results argue against the assumption of genotoxicity that is critical to CPSC's linear-through-zero risk assessment.

In the last twelve months, the Formaldehyde Institute and others have advised CPSC on several occasions of recent CIIT research, epidemiologic studies and other scientific evidence which we believe require re-examination of CPSC's formaldehyde risk assessment. Significantly, the Federal panel on Formaldehyde had suggested in

<sup>24</sup> W. Dalbey, "Formaldehyde and Tumors in Hamster Respiratory Tract", 24 *Toxicology* 9-14 (1982).

<sup>25</sup> When 30 ppm of formaldehyde was administered prior to injections of dethylnitrosamine (DEN), however, a higher number of tracheal tumors per tumor-bearing animal resulted than when the animals received DEN alone. When formaldehyde exposure began after a ten-week series of DEN injections, this effect was not observed. At higher concentrations, then, formaldehyde under certain conditions could act as a promoter ("enhancing agent" or "cofactor") in carcinogenesis. Even at 30 ppm, however, it did not act as an initiator of the carcinogenic process.

<sup>26</sup> Litton Bionetics, "Final Report on *In Vivo* Mutagenicity Studies in Formaldehyde Vapors" (1982).

its 1980 Report that further research might show that "the cytotoxic effects of formaldehyde may play a crucial role in its overall carcinogenicity" and pointed to pending epidemiologic research, in particular the Levine study of morticians, as significant on-going research. Yet CPSC has not revised its risk assessment, nor has it re-convened the Federal Panel or any other chronic hazards advisory panel. Under the 1981 Amendments to the Act,<sup>27</sup> the CPSC may not issue any proposed rule respecting an alleged chronic hazard prior to convening an expert panel. We believe that the recent data warrant convocation of such a panel and that indeed it is required prior to any proposed rulemaking.

#### V. LIMITATIONS ON CPSC'S JURISDICTION

Georgia-Pacific submits that CPSC's examination of alleged acute and chronic problems in manufactured housing is unwarranted, unnecessary and an intrusion on the jurisdiction of HUD.

##### *A/ HUD's jurisdiction over indoor air quality in manufactured housing*

Although HUD is actively considering a rule to limit formaldehyde emission levels from pressed wood products made with urea-formaldehyde resins in manufactured housing, CPSC nevertheless seeks to regulate these products as one of its top priorities. However, Congress has determined that HUD is the *sole* agency with jurisdiction over indoor air quality in manufactured housing. In 1972, Congress was asked specifically to extend CPSC's authority to manufactured housing. It refused to do so. See 118 Cong. Rec. 21897-901 (1972). Two years later, the issue was conclusively resolved when the National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 *et seq.*, granted HUD the responsibility and authority to regulate the safety of manufactured housing and its components. This grant of authority was recently recognized by CPSC's Office of General Counsel:

Since this statute addresses mobile home safety in a more recent and more specific way than the CPSA does, it is evidence that Congress does not intend the Commission to exercise concurrent jurisdiction with HUD over mobile homes.<sup>28</sup>

CPSC's action seems especially unwarranted when HUD has unquestionably assumed the responsibility given to it by Congress. It has engaged in extensive rule-making proceedings designed to establish a formaldehyde emission standard which will satisfy any possible health concerns without unduly restricting the widespread use of pressed wood products in manufacturing housing. See 47 Fed. Reg. 43466 *et seq.* It is expected that HUD will publish a proposed rule very shortly establishing product standards of 0.3 ppm for particleboard and 0.2 ppm for plywood tied to target ambient levels of 0.4 ppm. CPSC's active involvement when HUD is at an advanced stage in reviewing this issue suggests that CPSC is proceeding on a fast track to regulate a broad spectrum of products because it disagrees with the standards which HUD is planning to propose.

##### *B. CPSC's lack of jurisdiction over most pressed wood products used in conventional housing*

The Commission's statutory authority under the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051, is limited by the definition of "consumer product" to:

[A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a . . . residence, a school . . . or otherwise, or (ii) for the personal use, consumption, or enjoyment of a consumer in or around a . . . residence, a school, or . . . otherwise . . . (15 U.S.C. § 2052(a)(1)).

The CPSA and its legislative history clearly exclude houses and components of houses from the definition of a consumer product. In a well-reasoned opinion which rejected a claim of jurisdiction over aluminum branch wiring, Judge Leventhal exhaustively examined the legislative history of the CPSA and held that houses and their components were not covered by the CPSA. *CPSC v. Anaconda Co.*, 593 F.2d 1314, 1320-21 (D.C. Cir. 1979). The Pressed-Wood Products Market Report prepared by the CPSC Directorate of Economics, which is attached to the August 12, 1982, Briefing Package, shows that the largest use of pressed wood products is as components in new housing. Such components are not "consumer products" under the CPSA and cannot be regulated by the Commission.

Although recognizing the lack of jurisdiction over pressed wood products incorporated into housing, the Office of General Counsel nevertheless contends that some building components can be considered to be consumer products if they are sold

<sup>27</sup> Section 31(b) of the Consumer Product Safety Act, 15 U.S.C. § 2080(b).

<sup>28</sup> Memorandum from Alan Shakin to Ron Medford, May 7, 1982.



"over the counter" directly to consumers as separate articles of commerce. However, such sales must be customary and significant. If the consumer use is "only occasional and is not customary," there would be no CPSA jurisdiction.<sup>29</sup> Many pressed wood products used in new home construction are rarely sold to consumers as distinct items of commerce. For example, items such as floor underlayment (which have large surfaces which could emit some formaldehyde), are customarily sold as part of a new house, and occasional sales to consumers are not significant. Such items therefore cannot be regulated by CPSC.

Some building components, such as certain types of shelving, counters, etc., which may be sold to consumers over the counter in significant quantities and as distinct articles of commerce arguably may fall within the Commission's jurisdiction. However, the contribution of these products to the ambient level in a typical home environment is likely to be slight. Offgassing of formaldehyde is affected by board surface area, air volume and ventilation. Pressed wood items which may be sold directly to consumers for remodeling are likely to have small exposed board surfaces and be used in only one or two rooms in the home. The normal ventilation in a house would substantially dissipate any emissions from these products. It is for this reason that complaints about formaldehyde products in conventional homes are exceedingly rare.

In sum, there is substantial question concerning CPSC's statutory jurisdiction over most pressed wood products. As to some products and applications CPSC has no jurisdiction; even where it arguably has jurisdiction it will not be able to demonstrate "unreasonable risk" warranting regulation due to low levels of formaldehyde emissions in conventional homes.

CPSC should examine the jurisdictional basis for its wood products now—prior to commencement of extensive rulemaking proceedings.

#### VI. THE FEDERAL HAZARDOUS SUBSTANCES ACT

Wholly apart from the jurisdictional question, if CPSC were to proceed to regulate pressed wood products, it must do so under the Federal Hazardous Substances Act (FHSA) rather than the CPSA. We protest the docketing under the CPSA of the petition by the Consumer Federation of America seeking a 0.05 ppm standard for wood products and would oppose similar efforts to regulate wood products under that statute.

Section 30(d) of CPSA, 15 U.S.C. § 2079(d), requires CPSC to regulate under the FHSA when an alleged risk of injury can be eliminated or reduced to a sufficient extent under FHSA unless CPSC finds by rule that the public interest requires use of the CPSA. The comprehensive procedures of the FHSA permit all interested parties to analyze and test evidence through an adversary hearing with rights of cross-examination. We believe that had these procedures been followed in the case of UFFI, the decision to ban might never have been made. Indeed, CPSC's failure to proceed under FHSA in that rulemaking has emerged as a central legal issue in industry's challenge of the UFFI ban. We urge that CPSC strictly observe the statutorily-prescribed procedures in its wood products rulemaking.

#### CONCLUSION

In conclusion, Georgia-Pacific invites this Committee's attention to CPSC's activities in pressed wood products, and in particular, to its compliance with sound scientific principles of risk assessment and with the letter and spirit of statutory directives defining CPSC's jurisdiction and procedures and requiring its consultation with an independent scientific advisory panel in evaluating chronic hazards.

<sup>29</sup> As the Court stated in *Anaconda*, 593 F.2d at 1322 (emphasis added): "Jurisdiction does not require a showing that a majority of product sales are to consumers, but there must be a significant marketing of the product as a distinct article of commerce for sale to consumers or for the use of consumers before the product may be considered as 'customarily' produced or distributed in that manner."

THE PROCTER & GAMBLE CO.,  
Cincinnati, Ohio, February 24, 1983.

Senator ROBERT KASTEN,  
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science and  
Transportation, Washington, D.C.

DEAR SENATOR KASTEN: The Procter & Gamble Company would like to submit a statement for the record of your Subcommittee's hearing regarding reauthorization of the Consumer Product Safety Act (CPSA). Because the aspect of the Commission which is presently of greatest concern to us is the matter of disclosure under § 6(b), this submission will address only the topic of § 6(b).

Section 6 is not "broken" and does not need "fixing." We have had experience with the section in operation and we have spoken with the staff of the Commission about implementation of the section. These comments are based on our experiences with the section as well as on our historical experience with the matter of adverse publicity and federal agency disclosures.

Our conclusions are as follows:

1. Section 6(b) as currently enacted as proven to us that it serves a legitimate public policy purpose.

2. Oversight by your Subcommittee of the funding and personnel allocated to § 6 activities will show that the administration of § 6 has been very weak, reducing the ability of that section to work according to the congressional plan. If there are 900 backlogged § 6 decisions, the delay rests with the recalcitrant way in which the agency has approached the statute's mandate, not with deficiencies in the statute itself.

3. Many of the mundane notifications about insignificant matters can be handled more promptly than they currently are being handled by CPSC staff. "Battles" over disclosure are exceptional, not routine.

4. To the extent the staff of the Commission has criticized § 6 use by manufacturers, the criticism reflects immediately back on the employees who created those very records. Had the employees who created the records proceeded with attention to accuracy, avoided unfounded supposition and hearsay, and thoroughly checked the facts during input to CPSC files, these disputes over output would not exist.

I would like to list the six instances of § 6 notifications which we have experienced since the effective date of the 1981 amendments. In every case, we have met the time deadline set by the staff; *in five of the six cases, we did not object to disclosure* so long as a clarification was distributed with the documents.

1. November 1981: Complaint criticized a product described as "baby Pampers made in Aiken, South Carolina." The hotline caller was referring apparently to a generic brand disposable diaper. We told the staff that we had no objection so long as the release included our comment that the product in question was not our Pampers (R) and that we never made diapers in Aiken, South Carolina.

2. December, 1981: A lawyer complained about a client's cosmetic product skin irritation some 14 months after the irritation allegedly occurred. We had no objection to release of that file so long as the disclosure noted that (1) CPSC had no jurisdiction over the cosmetic, (2) no CPSC investigation of the merit of the complaint had been made, and (3) we believe based upon our extensive experience that the complaint was unwarranted.

3. December, 1981: A complaint about a dryer product was contrary to the on-scene independent investigation of a dryer manufacturer's service representative, who examined the dryer and concluded the complaint against the product was unfounded. CPSC staff made no conclusion about the complaint. Many of the documents to be disclosed were part of a closed file; the file was closed by a 5-0 vote of Commissioners several years before to deny a petition against that product. We did not object to disclosure, but asked that the disclosure be accompanied by all three clarifying facts above showing the lack of basis for the allegation.

4. November, 1982: Complainant says the colors ran out of her drapery when laundered and that our product was not "safe for colored fabrics." Because it alleged an "unsafe" matter, the staff sent it to the epidemiology group. We did not think that type of "safety" for fabrics was within the CPSC's jurisdiction, but we assured the staff that our laboratory would test the fabric and diagnose what error in laundering had occurred, if the consumer was willing to share her identity with us.

5. November, 1982: A complaint file relating to a cleaning product was grossly inaccurate. The staff compiled hotline records which had technically inaccurate data and records of phone calls listing triple or double hearsay about the product's effects. We provided within the short time allowed a specific response to each factual aspect of the proposed disclosure. We asked that portions be deleted unless adequate

corrections were made. Section 6(b) served a vital accuracy-protective purpose as Congress intended. We do not know what or when disclosure resulted.

6. January, 1983: A parent had alleged skin redness in an infant's diaper area in September, 1980. If it had been our product, we had no notice of the allegations prior to the January, 1983 § 6 notice. The consumer's physician and laboratory had found no fault with the diaper. We had no objection to release of the hotline report so long as the additional information was released as well.

We have a larger number of consumer products than most firms but we believe that our § 6 experience would be fairly typical, with regard to accuracy of the Commission documents and the misleading nature of the information contained in phone records prepared by CPSC employees. Our experience showed us that input to the CPSC's files is not done with such a high degree of accuracy as we had once expected. When Congress imposed § 6 as a protection for fairness and accuracy, it made the proper choice. Since *input* accuracy is a constant concern, the task of § 6(b) in making *output* proceed through an accuracy channel is fully appropriate as a legislative decision.

A missing factor, unknown to us, is how long it took the CPSC staff to actually deliver the document to the requesters after we (within the short time allowed us) gave the staff our replies. Were all six held as part of the large backlog the CPSC claims to exist? If so, five of the six should not have been and release should have been routinely completed by stapling our letter to the released document and mailing them out. If so, the backlog is one the Commission has created. Oversight should press for more resources to release those files in which the responses did not object to a qualified disclosure.

Stepping back from our experience to historical and social policy concerns, we believe that § 6 has served admirably to fulfill the statutory compromise. No single party prevailed in the 1981 legislative debate over revision of § 6; it was not a dramatic change "won" by industry, consumer groups, or the staff, but each achieved something by adoption of amended § 6. We note that the issues of most debate were those of § 6(a), with a rough consensus reached that § 6(b) would proceed, as the Supreme Court had suggested, to expressly cover all disclosures. That consensus remains fully valid today.

There is a legitimate societal need for *credible* product information, and § 6(b) serves that need. Great powers for the acquisition and distribution of product information came to the CPSC from adoption of the National Commission on Product Safety's recommendations; with those powers, Congress properly included responsibility for the accuracy of the disseminations. The 1975, 1978 and 1981 reexaminations of the Act have confirmed the rationality of that joinder of powers and tempering measures in § 6. More oversight, over the next two years, will reveal more about the *input* of data into the CPSC and ways in which that input can be improved in quality. Improving credibility through quality of input is an optimal longer-term solution to the societal need for a credible output of accurate safety information.

The answer to the administrative "failures" alleged to exist is oversight, not retreat. The Commission has not made the effort necessary to obey the mandate of § 6. Perhaps the next two years of reauthorization can serve as the period in which the operation of § 6 is closely monitored by Congress. Then a fair conclusion can be made at the next reauthorization. How long did the Commission hold § 6(b) files about which no objection was made? Did the Commission clearly carry out the statutory intent of 1981 in both its belated rules and the interpretation of whatever rules are finally adopted? Did the Commission improve the input functions, where accuracy and fact checking could best be done by the field offices and the hotline staff?

In social policy terms, § 6(b) is a landmark in federal administrative law, one that cannot lightly be discarded. The government can damage a new or existing product so badly by disseminating inaccuracies and hearsay, that commentators who have studied its operation, including Professor (now Judge) Scalia, who authored the leading article on CPSC procedure, and Michael Lemov, who authored the new textbook on CPSC procedure, do not dissent from the need for § 6(b). The Supreme Court's unanimous decision in the *GTE* case in 1980 endorsed the fairness of § 6(b) and rejected the Commission's post-hoc rationalization against § 6(b) which set off the arguments in that case.

Social policy more often places a value upon fairness than upon procedural delays, where private rights are at issue. For example, two years after passage of the CPSA, Congress reacted to improper disclosure of many agencies' documents about individuals by mandating in the Privacy Act that records must be maintained "with such accuracy, relevance, timeliness, and completeness as is reasonably neces-



sary to assure fairness to the individual in the determination." (5 USC § 552a(e)(5)) Since that time, many courts have found agencies improperly maintained records in less than an accurate manner, and some have awarded damages. The CPSC injury to reputation is often of greater economic consequence than an individual's economic loss from inaccurate disclosure. But no damage award was created under the CPSC; rather, the output control system of § 6(b) serves that function. This is a socially correct judgment tailored to the situation of the CPSC and its information processes.

Finally, we believe that oversight is less expensive than litigation. If the Harrill letter were to be accepted, the state of the law in 1980 would be restored, uncertainty about disclosure would return, and only by suing the Commission could a regulated firm preserve its rights. Litigation would increase tremendously, and the federal courts would again be involved in making choices about fairness which should be made more efficiently under a defined § 6(b) scheme. The Supreme Court's invitation to Congress to correct the gaps in § 6(b) was answered in 1981. That answer remains correct. Litigation and uncertainty should not be substituted for the present administrative requirements.

Therefore, we respectfully urge the Subcommittee to hold oversight on § 6(b) but not to alter the statute. We attach for the record several documents which we have placed in the rulemaking file of the CPSC's proposed § 6(b) rulemaking.

Thank you for the opportunity to express these views.

Sincerely,

JAMES T. O'REILLY,  
Senior Counsel, Food, Drug and Product Safety.

STATE OF VERMONT,  
OFFICE OF THE ATTORNEY GENERAL,  
Montpelier, Vt., February 24, 1983.

HON. ROBERT KASTEN, Jr.,  
Chairman, Consumer Subcommittee of the Committee of Science, Commerce and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: I am writing to voice my support of the U.S. Consumer Product Safety Commission. I understand that your Committee is in the process of considering reauthorization for the Commission. It might, therefore, be helpful to you to hear from a state official who deals from time to time with the CPSC.

I have had the opportunity to observe the Commission from three different positions over the last several years. During the mid-1970's I was the Assistant Attorney General in charge of Vermont's Consumer Protection Program. In this capacity, I was the state designee for relations with the Consumer Product Safety Commission. I later had an opportunity to observe the workings of the Commission more directly when I served on the Product Safety Advisory Council to the CPSC from July 1, 1977 to July 15, 1979. Finally, as Attorney General for the state since 1981, I continue to take an active interest in the Commission. As a result, I have gained some unique insight into the operation of the Consumer Product Safety Commission and its ability to protect consumers from unreasonable risks of injury from unsafe consumer products.

While every state has either a mini-FTC act or some other general deceptive business practices law, many states do not have acts similar to those administered by the CPSC dealing with product safety. As a result, we at the state level must depend on a strong and active Consumer Product Safety Commission to protect our consumers from unreasonable risks. Despite very limited resources, the CPSC has worked hard to fulfill its obligation to the American public.

One way in which the CPSC has carried out its role is with a very effective program of federal-state relations. I know from personal experience that this was true in the past. In checking with my staff, I find that the close working relationship has continued. For example, on the ban of urea-formaldehyde foam insulation, my office couldn't have been happier with the cooperation we received from CPSC officials. Had we taken action at the state level similar to that taken by the Commission we would have needed to rely on much of the work already performed by the Commission. Officials there were ready to provide us with whatever we might have needed. Looking to the future, I hope that we retain a strong CPSC which can indeed provide meaningful support to small states such as mine.

Also, unlike some federal agencies, the CPSC is willing to assist states no matter how small the problem might be. Some federal agencies like only the "big" cases. They find matters which may be important to states not to be important enough for

their consideration. The Consumer Product Safety Commission certainly is not such an agency. My office knows it can depend on the CPSC to provide assistance for practically any issue which comes under its jurisdiction.

I would strongly urge the reauthorization of a healthy Consumer Product Safety Commission with sufficient resources to carry out its statutory mandates. Without the CPSC, there is no other state or federal agency with the mandate—and the proven ability—to protect consumers from dangerous or defective products in the marketplace.

Sincerely,

JOHN J. EASTON, Jr.,  
Attorney General.

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NATIONAL CHIMNEY SWEEP GUILD,  
Merrimack, N.H., March 1, 1983.

HON. ROBERT KASTEN,  
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: We understand that Congress now is considering reauthorization of the Consumer Product Safety Commission. We would like to add the voice of the National Chimney Sweep Guild and its members to those who are recommending its reauthorization.

As members of a trade whose entire purpose is the protection of the public safety, we are acutely aware of the enormous impact this agency has had—and hopefully can continue to have—on the life safety of the nation's consumers.

A case in point—from our own industry—is the recent CPSC ruling requiring mandatory labeling of wood and coal burning stoves to include installation and maintenance information. This is a ruling we supported wholeheartedly (see attachment). It will, we believe, go far toward solving a problem that now claims over 130,000 homes per year from preventable home fires. But without the Consumer Product Safety Commission's action, the American public would have been left at risk by an industry that has, unfortunately, been unable to cope voluntarily with the problem.

It is our belief that reauthorization of the Consumer Product Safety Commission is essential to the continued safety of the American public and the public's continued confidence in its government as protectors of the common welfare. There are many agencies in the United States Government that rightly protect the health and welfare of American business. But it is incumbent upon our American system of checks and balances to also protect the welfare of the consumers who purchase and use the products of American business. The Consumer Product Safety Commission does this. Let's keep it that way.

Regards,

PAUL BOURQUE, President.

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EXECUTIVE DEPARTMENT,  
OFFICE OF CONSUMER AFFAIRS,  
Atlanta, Ga., March 4, 1983.

HON. ROBERT KASTEN,  
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As Administrator of the Governor's Office of Consumer Affairs for the State of Georgia, I strongly favor reauthorization of the U.S. Consumer Product Safety Commission. The cooperation between my office and the Atlanta Regional CPSC has benefited Georgia's citizens by making them better informed and by fostering a safer marketplace in our state.

These cooperative efforts have provided necessary product safety education to an estimated one and a half million Georgians. Our topics have included burn prevention, home insulation, playground equipment, infant safety, and many others.

Our compliance and enforcement programs have been effective in curtailing unscrupulous and dangerous activities. Products related to these activities include untreated cellulose insulation, unsafe architectural glazing materials, and unstable refuse bins. We have also monitored the effectiveness of product recalls.

In implementing contracts awarded to us by the Commission, we have received excellent technical assistance from the Regional Office staff. Their willingness to

help disseminate the product safety message in Georgia is further exemplified by our joint activities such as state-wide conferences and workshops.

We have thoroughly enjoyed our relationship with the Commission during the last six years. I strongly recommend that sufficient funds be made available to continue these significant and worthwhile federal-state efforts.

Very truly yours,

BARRY W. REID, *Administrator.*

NATIONAL RETAIL MERCHANTS ASSOCIATION,  
Washington, D.C., March 7, 1983.

Hon. ROBERT KASTEN,  
*Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Technology, U.S. Senate, Washington, D.C.*

DEAR SENATOR KASTEN: The National Retail Merchants Association ("NRMA") would like to go on record as opposing the Consumer Product Safety Commission's request that Congress dilute the protections of Section 6(b) of the Consumer Product Safety Act. Both consumers and the business community would be the losers if Section 6(b) were revised in the manner suggested by the CPSC.

NRMA is a voluntary, non-profit trade association whose 3,500 corporate members operate over 35,000 department, chain and specialty stores throughout the nation. NRMA's members have an aggregate net annual sales volume in excess of \$150 billion and employ over 2.5 million workers. Approximately three-fourths of NRMA's members are small businesses with annual sales of less than \$1 million each. As retailers of consumer products, NRMA's members are vitally interested in the nature of the CPSC's statutory powers and responsibilities.

In enacting Section 6(b) at the time of the establishment of the Commission itself, Congress recognized the importance of protecting businesses and consumers from the undesirable consequences of disclosure of inaccurate, and thereby misleading, information. Congress enacted these protections both in light of the Commission's broad data-gathering powers and the importance of voluntary reporting by companies of possible product hazards under Section 15 of the CPSA. Accordingly, Section 6(b) provides that the CPSC cannot disclose information from which the identity of a consumer product manufacturer can be readily ascertained unless it has taken reasonable steps to assure, prior to disclosure, that the information is accurate and that disclosure is fair under the circumstances and reasonably related to effectuating the purpose of the CPSA.

Section 6(b) serves several important functions. It guards against irreparable tarnishment of a business' reputation that could result from the release of inaccurate, misleading and tentative information. This protection is especially necessary in view of the CPSC's broad information-gathering powers. The Section 6(b) procedures also protect consumers, by lessening the chance of confusion and misunderstanding that could flow from the dissemination of unverified information.

The CPSC has never liked Section 6(b) and, in NRMA's view, still refuses to acknowledge its clear instructions. Thus, for instance, the CPSC originally maintained that Section 6(b) did not apply to information disclosed in response to a Freedom of Information Act request, until that argument was laid to rest in *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 702 (1980). In that case, a unanimous Supreme Court held that all proposed disclosures of information revealing identities of a manufacturer are subject to Section 6(b). Further, despite the Commission's prolonged resistance to the Section 6(b) requirements, Congress chose in 1981 to make the Section 6(b) protections even stronger.

More recently, the CPSC published proposed regulations concerning the manner in which it intends to discharge its duties under Section 6(b), 47 Fed. Reg. 50283 (November 5, 1982). As evidenced by the comments NRMA submitted to the CPSC, a copy of which is enclosed for your information, NRMA believes that the CPSC has sorely misconstrued Congress' intent and mandate concerning the precautionary steps that must be taken before release of information subject to Section 6(b). Indeed, as noted in NRMA's comments, numerous provisions of the Commission's proposed regulations are blatantly inconsistent with the statutory language of Section 6(b).

The CPSC's current call for revision of Section 6(b) is merely the agency's latest attempt to unburden itself. NRMA submits that Section 6(b) is an important and purposeful statutory provision. Instead of relaxing the protections afforded by Sec-



tion 6(b), Congress should reaffirm them and direct the CPSC to draft regulations that properly reflect the language and purpose of Section 6(b).

Respectfully submitted,

VERRICK O. FRENCH,  
*Senior Vice President, Governmental Affairs.*

DEPARTMENT OF HUMAN RESOURCES,  
HEALTH DIVISION,  
BOARD OF PHARMACY,  
*Portland, Oreg., March 8, 1983.*

Senator ROBERT KASTEN,  
*Subcommittee on Consumer, Committee on Commerce, Science, and Transportation,  
U.S. Senate, Washington, D.C.*

DEAR SENATOR KASTEN: I am writing to ask for your support in seeing the continuance of the Consumer Product Safety Division.

The Oregon State Board of Pharmacy works closely with the Portland based agent, and has found this relationship to be both mutually beneficial and essential to protect the health and welfare of the citizens of Oregon.

I feel that the continuance of this agency to be essential and would greatly appreciate your support in this matter.

Sincerely,

THOMAS J. CATON, *Executive Director.*

NATIONAL ASSOCIATION OF MANUFACTURERS,  
LAW DEPARTMENT,  
*March 10, 1983.*

Senator ROBERT W. KASTEN,  
*U.S. Senate,  
Washington, D.C.*

DEAR SENATOR KASTEN: The National Association of Manufacturers (NAM) appreciates this opportunity to offer written comments to your Consumer Subcommittee regarding the reauthorization of the Consumer Product Safety Commission (CPSC). NAM has more than 12,000 member firms which accounts for 80 percent of the nation's industrial output and represents 85 percent of the nation's industrial jobs. As such, many of our member companies are regulated or potentially may be regulated by the CPSC.

We would like to take this opportunity to state that we believe the reauthorization of the CPSC is an important issue before your Subcommittee. Because of the thousands of companies and products subject to CPSC jurisdiction there is immense potential for possible harm to a manufacturer or private labeler if the Commission is not scrupulous in the exercise of its congressional mandate. Because of this we feel that it is imperative that the Commission be reauthorized on a regular and frequent basis. To assure that the Commission is following the dictates of the Congress, we would like to raise the following points that we feel are critical to this year's authorization.

Section 6(b)—Disclosure of Product Information. When the Consumer Product Safety Act was enacted Congress was sensitive to the problems that are attendant to public disclosure of information and thus included Section 6 in the Act. Finally in November of 1982 implementing regulations were proposed by the Commission. Admittedly this follows prior attempts at putting together an acceptable set of regulations and litigation that set down certain criteria that the Commission must follow. The current proposed regulations also implement changes made in Section 6 during the reauthorization of 1981. Prior to the time that the regulations are finalized and implemented, the Commission is now seeking changes in Section 6 from the Congress. We emphatically request that no changes be made to Section 6 until the implementation of the regulations can provide a frame of reference in the event future alterations are necessary. Specifically we do not feel that Freedom of Information Act (FOIA) requests should be exempted from the proposed regulations. This is particularly true when the Commission releases information under a FOIA request and the information was not generated by the Commission, but is in its possession, and unknown to the manufacturer. We feel that it is not an unreasonable burden upon the agency that any release of information be given the coverage and protections under Section 6. As stated above, with the vast number of companies and products subject to Commission jurisdiction it is imperative that caution be used to prevent

unauthorized and unwarranted disclosure of inaccurate or misleading information that could prove damaging in the marketplace.

Another issue that we feel is of key importance to this reauthorization is a two-year reauthorization period. We feel there are ample reasons to support this recommended time period. Initially it appears that there are no congressionally mandated agencies that have had reauthorization for the five year period requested by the CPSC. For example, the Nuclear Regulatory Commission has an annual reauthorization. The Federal Election Commission has had two and three year reauthorizations. The Federal Trade Commission has had two year reauthorization and the CPSC itself has never been reauthorized for longer than three years. Thus there is no precedent to warrant the period requested by the Commission, rather, there appears to be more compelling evidence that would support the two-year reauthorization. We also feel that it is not inappropriate for a congressionally created commission to have to support reauthorization every two years.

At this juncture the Commission is in a special situation as the Commissioners' offices with the exception of the current vacancy will all be up for reappointment between October of 1983 and October of 1986. Thus, with the potential that there could be all new commissioners, it would seem prudent that Congress would want to have the ability to give necessary direction to the Commission via the reauthorization process. During the reauthorization of 1981 the Congress created the Chronic Hazards Advisory Panel (CHAP) as a precedent to the Commission regulating in the chronic hazards area. Currently there is no history of the CHAP but there are programs that will be the subject of CHAP review. Within two years we will have the historical background that is needed to assess the utility of the CHAP and whether there are any necessary adjustments needed to improve its output and efficiency. We feel that this is important, as any greater reauthorization period could allow the CHAP to function unchecked and has the potential for laying the ground work for Commission regulation that could greatly impact an industry or product if not destroy its marketability. At a time when regulation of chronic and toxic properties are of key importance to the Congress as well as the general public it is important that this program be brought up for assessment and review when it has had time to function under the congressional mandate and provide the history upon which future decision about the CHAP's efforts and the ensuing Commission activity can be assessed.

We are supportive of the level of funding that has been recommended by the administration. We understood that Chairman Steorts is on record as stating that she feels that the Commission can function without jeopardizing any of its statutory mandates with the budget figures recommended.

It has been suggested that in the House of Representatives there is an interest by Congressman Waxman to provide statutory authority to the CPSC to regulate the burning characteristics of cigarettes. While the Commission has been working on standards for the flammability of fabrics we do not feel that their authority should be enlarged to include cigarettes. There are other government agencies that should regulate this product and it does not serve government economy of regulatory efforts to have more than one regulatory body dealing with the regulation of a product.

In sum we appreciate the opportunity to express our views on the reauthorization of the Commission. As indicated above we feel the critical issues are, to keep the protections of Section 6(b) of the Act, to limit the length of reauthorization to two years, to fund the agency at those levels recommended by the administration, and not to enhance the regulatory authority of the agency. We appreciate the Committee's efforts in this reauthorization and your consideration of our views.

Respectfully submitted,

JAN S. AMUNDSON,  
Deputy General Counsel.

STATE OF CONNECTICUT,  
DEPARTMENT OF CONSUMER PROTECTION,  
March 11, 1983.

HON. ROBERT KASTEN, Jr.,  
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: As the Commissioner of the Connecticut Department of Consumer Protection I have worked closely with the U.S. Consumer Product Safety Commission. The future of that Agency is now before your Committee.

Consumers are able to consider many factors for themselves when deciding whether or not to purchase a product; the cost and the warranty being the most obvious items that can be compared. Consumers cannot evaluate the safety of a product, nor is it reasonable to expect this of them.

A product may be unsafe because of an electrical, mechanical, thermal, or chemical hazard. Such hazard can only be identified after testing by individuals with specific expertise. Unfortunately, when considered as an item in the federal budget, laboratory equipment and professional cost money.

The over-riding issue should not be forgotten; the right of a consumer to assume that a product will not harm them if used and maintained correctly.

I urge that you maintain and fund the U.S. Consumer Product Safety Commission. There must be a regulatory agency with the specific intent and resources necessary to protect the consuming public from an unreasonable risk of injury and death in the marketplace.

Sincerely,

MARY M. HESLIN, *Commissioner.*

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THE SOCIETY OF PROFESSIONAL JOURNALISTS,  
SIGMA DELTA CHI,  
Washington D.C., March 14, 1983.

Senator ROBERT W. KASTEN, Jr.,  
Chairman, Consumer Subcommittee,  
Washington, D.C.

DEAR SENATOR KASTEN: Thank you for providing The Society of Professional Journalists, Sigma Delta Chi, with this opportunity to comment on the legislation that affects the ability of the Consumer Product Safety Commission ("CPSC") to release information to the press and the public. The Society is the oldest, largest and most representative organization of journalists in the United States, with more than 28,000 members in all branches of the news media, print and broadcast. We are submitting these comments in the hope of impressing your subcommittee with the full effect on journalists and the general public of § 6(b) of the Consumer Product Safety Act and to urge that § 6(b) be amended to permit information critical to consumer safety to flow freely.

Section 6(b) runs counter to the mandate that Congress embodied in the Freedom of Information Act ("FOIA") requiring administrative agencies to be open to the public. It puts control of public information in the hands of regulated industries, and virtually prevents the agency from releasing any information to consumers, who are, after all, the agency's chief constituents. This § 6(b) turns the process of providing information, both under the FOIA and on the agency's own initiative, on its head.

Section 6(b) raises questions concerning two kinds of information available from the CPSC: information responsive to requests under the FOIA and information affirmatively disseminated by the agency. The Society considers the restrictions on FOIA requests to be completely unjustifiable, and believes that looser reins upon the Commission and its staff under § 6(b) would satisfy all legitimate concerns of industry to avoid unfair product disparagement while enabling the CPSC to fulfill its mandate of safeguarding the public even more thoroughly and carefully than it can now.

As CPSC General Counsel Martin H. Katz pointed out in his testimony before your subcommittee on February 25, 1983, no other federal agency concerned with health and safety is forbidden, as is the CPSC, from simply releasing information under the Freedom of Information Act, if it is not covered by a specific exemption. The CPSC alone must submit documents to affected manufacturers or labelers for approval prior to release, review documents to determine if they are fair and accurate, possible purge them to the extent that they may not be, risk law suits if the manufacturers do not agree to their release, and wait well over a month and often longer before a requested document could possibly be ready for release. And all of this applies not only to information supplied to the agency by the manufacturer in the first place, but to documents filed by members of the general public or developed by the agency at public expense.

All of this blackout and delay amounts to an incomprehensible and insulting nightmare for journalists, researchers and the general public. The assumption behind it apparently is that we cannot tell the difference in probative value between a consumer complaint and a Commission-required recall, between an internal memorandum by a staff member recommending that a type of product be tested and



a formal rule by the Commission establishing safety standards for a product with proven defects. This patronizing assumption cannot be supported. Most journalists, researchers, and even the general public are reasonably intelligent and can tell the difference between an unverified accusation and ultimate proof. Yet the unverified complaint or the staff memorandum, suppressed under § 6(b) because it might be mistaken for ultimate proof, could have provided an invaluable tool to a journalist or researcher with the resources to follow it through.

Suppose a journalist is told that someone in his district was injured by an exploding fountain pen. If the CPSC could release information as the Environmental Protection Agency, the Federal Trade Commission, the Food and Drug Administration, the National Highway Transportation and Safety Administration, the Federal Aviation Administration and other agencies can, the reporter could learn whether any complaints had been filed on the pens, whether any action had been taken on them and, possibly, what memoranda had been developed discussing any such action or inaction. Any of these documents would make additional research possible. An investigator could check out the complaints himself, call the manufacturer, or test the product, and could turn the initial suggestions into a story, either about the product (that it proved to be fine or defective), the complainant (discussing actual causes of any injury, including whether they resulted from product defect or product abuse), or the CPSC (for adequate or inadequate attention to the matter). Under § 6(b), the researcher could get none of the information in the agency's files without the prior notification of the manufacturer as well as the censorship and delay (FOIA requests are backlogged at least for 30 to 40 weeks now) noted above. And some information would never be released at all even though it is not exempt under the FOIA. Consumers are being denied the opportunity to use the agency's information to determine the truth for themselves. It is inevitable that consumer safety suffers because of § 6(b)'s unwarranted assumption that the public cannot think, while the manufacturers continue to cheer § 6(b) for the protection it gives their reputations—unmatched by the law governing any other public agency.

Affirmative disclosures are, for the same reasons, admittedly more sensitive. An off-the-cuff remark by a Commissioner is more likely to be taken by the public as gospel than is a document passively released by the agency in response to an FOIA request. Yet here, too, § 6(b) goes too far. For example, § 6(b) apparently prevents agency staff from answering hundreds of factual telephone inquiries from journalists and others each year asking questions concerning whether complaints been filed about X, whether it is being tested, and what the results of any tests were. Section 6(b) should be amended to permit the agency to respond to such inquiries without requiring notification to an affected manufacturer.

As § 6(b) stands now, journalists no longer look to the agency for leads, background, general or specific information—even to follow-up on the agency's own press releases. In contrast to the broad mandate from Congress embodied in the FOIA and favoring disclosure, § 6(b) fosters protection of regulated industries over protection of the public, an opportunity for sweetheart deals with industry to blossom or appear to (although there is no reason to believe this has happened yet or is likely), and wasted resources, as the agency must turn its attention from its own charted course to verifying consumer complaints, and as it must refuse to release its material to outsiders such as journalists who otherwise could use it to pursue the agency's own ultimate goal: protecting the consuming public.

To restore openness to the CPSC, and in the interest of good common sense and educated consumers, the Society of Professional Journalists respectfully urges that you amend § 6(b) to permit the Consumer Product Safety Commission to make the protection of consumers—and not the protection of manufacturer's reputations—its first priority.

Very truly yours,

STEVEN R. DORNFELD, *President.*

